Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

BAHIG BISHAY,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS.

On Petition for a Writ of Certiorari to the Commonwealth of Massachusetts Appeals Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Bankruptcy Code provides that "a plan [of reorganization] may * * * provide for * * * the retention and enforcement by the debtor * * * of any * * * claim or interest * * * belonging to the debtor or to the estate." 11 U.S.C. 1123(b)(3).

The question presented is whether, notwithstanding 11 U.S.C. 1123(b)(3), a bankruptcy confirmation extinguishes a debtor's claims against a creditor despite the facts that (a) the plan of reorganization expressly preserves the debtor's right to pursue all claims he may have against that creditor, and (b) the creditor is indisputably aware that the claims have been preserved.

PARTIES TO THE PROCEEDINGS BELOW

The caption identifies the parties to the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bahig Bishay respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Appeals Court in this case.

OPINIONS BELOW

The opinion of the Massachusetts Appeals Court (Pet. App. 1a-10a) is available at 2002 WL 31375621. The opinion of the Massachusetts Superior Court (Pet. App. 11a-34a) is available at 1997 WL 785596.

JURISDICTION

The Massachusetts Supreme Court denied a timely request for further appellate review (Pet. App. 35a) on January 7, 2003. This Court has jurisdiction under 28 U.S.C. 1257

RELEVANT STATUTORY PROVISIONS

11 U.S.C. 1123(b)(3) provides in relevant part:

[A] plan may * * * provide for –

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest.

STATEMENT OF THE CASE

A debtor who files for Chapter 11 bankruptcy notifies his creditors and the bankruptcy court of all assets he owns, including any lawsuits he may file against his creditors. See, *e.g.*, *Oneida Motor Freight, Inc.* v. *United Jersey Bank*, 848 F.2d 414, 416 (CA3 1988). When the bankruptcy court confirms a plan of reorganization, the order of confirmation is a binding judgment that, by default, is *res judicata* with respect to claims between the debtor and the creditors. See,

e.g., *Katchen* v. *Landy*, 382 U.S. 323, 334 (1966). In some cases, litigating all such claims in the bankruptcy court would take years. In order to expedite the process of Chapter 11 reorganization, Congress accordingly enacted a statute permitting a debtor to reserve his claims for litigation after the bankruptcy plan is confirmed: "[A] plan may * * * provide for * * * the retention and enforcement by the debtor * * * of any * * * claim or interest * * * belonging to the debtor or to the estate." 11 U.S.C. 1123(b)(3)(B). In this case, the creditor (Citizens Bank) itself drafted the plan's reservation clause: "The Debtors' estates may retain and, by [their] duly authorized representative(s) settle, release or prosecute, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the 'Alleged Claims')." The bankruptcy court approved the plan, including the reservation clause, and ordered the debtor (petitioner Bishay) to post $500,000 as security for costs Citizens might incur in defending against those claims. The Massachusetts Appeals Court nonetheless held that the confirmation of the plan extinguished all claims Bishay filed thereafter. Pet. App. 4a-5a & n.5.[1]

The lower court's ruling exemplifies the sharp conflict over whether a Chapter 11 debtor can preserve his right to bring *all* claims against a creditor by including in the reorganization plan a clause to that effect. The Massachusetts Appeals Court's *per se* rule in this case — holding that a debtor may preserve only those claims that he names specifically in the plan — has been adopted by the Sixth and Seventh Circuits. By contrast, the Eighth Circuit and the Supreme Courts of Virginia, Alaska, and Louisiana have

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[1] As the Massachusetts Superior Court acknowledged, "[t]he res judicata effect of an order of a bankruptcy court, a federal tribunal, is governed by federal preclusion principles." Pet. App. 22a n.21. The *res judicata* effect of the bankruptcy court's confirmation order was the principal subject of the litigation in the Massachusetts state courts in this case.

opted instead for an intermediate approach, enforcing a clause that reserves all claims if the creditor is aware that claims against it are preserved. A third group of courts has interpreted Section 1123(b)(3) to embody the opposite *per se* rule from the one applied below – *i.e.*, as *authorizing* a debtor to preserve all claims simply by inserting a "blanket" reservation clause into the plan. This Court's intervention is needed to resolve the conflict and to correct the harmful mistaken interpretation of Section 1123(b)(3) that potentially affects any Chapter 11 bankruptcy.

1. Petitioner Bahig Bishay owns a business in East Walpole, Massachusetts that sells, leases, and services luxury cars. In 1988, Bishay borrowed for his business $2,560,000 from Neworld Bank; and from 1989 through 1994, Bishay entered into a series of agreements with Neworld regarding the timing for repaying the loan. Pet App. 11a-15a. Respondent Citizens Bank bought Neworld in April 1994 and immediately changed the course of dealing with Bishay. Citizens wrongly denied that Bishay had repaid any of the principal on the loan, when in fact he had repaid $300,000. The bank also used private information it learned from Bishay to try to acquire for itself a property about which Bishay was negotiating with the FDIC. When Citizens' actions prevented Bishay from meeting his loan repayment schedule (*e.g.*, by making it extremely difficult for him to receive financing from other sources), Citizens sued Bishay for breach of contract in Massachusetts Superior Court in June 1995. Bishay filed an answer containing a counterclaim that alleged (1) a breach by Citizens of its duty of good faith and fair dealing, and (2) unfair trade practices by Citizens under Massachusetts General Laws Chapter 93A. Pet. App. 19a.

Although Bishay was willing and able to pay his creditors — indeed, he repaid *every* creditor *in full* — he was compelled to file for Chapter 11 bankruptcy to protect himself against the actions of Citizens that were preventing him from running his business. See Pet. App. 19a-20a. Bishay tried to pay Citizens in full, but Citizens refused the offer of full

payment, demanding that Bishay also release all of his claims against Citizens. Bishay refused the demand, and in October 1995 he gave Citizens a list of additional claims that he intended to pursue against the bank and notified Citizens that he would amend his previously filed counterclaims to include the additional claims.

Citizens filed a third-party plan of reorganization in the Bishay Chapter 11 proceeding. See Pet. App. 20a. This plan initially sought to extinguish Bishay's claims against the bank by providing that Citizens would pay Bishay $10 in return for the release of "all claims." The Chapter 11 Trustee informed Citizens of his intention to oppose the plan on the ground that its failure to preserve those litigation rights made the plan unconfirmable. In response, Citizens modified its proposed plan by replacing the claim-extinguishing clause with the claim-preserving clause at the heart of this case: "The Debtors' estates may retain and, by [their] duly authorized representative(s) settle, release or prosecute, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the 'Alleged Claims')." On July 31, 1996, the bankruptcy court issued an order appointing Bishay as the "authorized representative" of his estate.

Neither the plan of reorganization nor the order of confirmation determined the extent to which Bishay's debt to Citizens was enforceable. To the contrary, the plan – which, as noted, Citizens itself had drafted – required Bishay to pay the debt to Citizens only "until and unless" those obligations were reduced by an offsetting judgment obtained by Bishay against Citizens in the pending state court litigation. The plan accordingly characterized Citizens' claims against Bishay as "impaired," whereas it characterized the claims of all other creditors as "unimpaired." Citizens further acknowledged Bishay's preserved claims by demanding that the bankruptcy court require Bishay to post the extraordinary sum of *$500,000* as security for the costs Citizens might incur in defending itself against those claims. In its request, Citizens

referred specifically to Bishay's itemized list of claims and described the claims as "wide-ranging." The bank also acknowledged these claims, and petitioner's retention of them, in its Disclosure Statement.

The bankruptcy court approved Citizens' proposed plan on April 23, 1996. Pet. App. 20a. The confirmed plan reserved Bishay's right to "prosecute [his] alleged claims against Citizens" on the condition that Bishay post the $500,000 as security for Citizens' defense of those claims. Bishay complied with the order by posting the $500,000.

2. In June 1996, Citizens filed a motion in Massachusetts Superior Court for summary judgment with respect to Bishay's two-count counterclaim; and Bishay moved to amend his answer and counterclaim. The court granted Bishay's request, and it denied Citizens' motion "without prejudice to renew it as to the amended answer and counterclaim." Pet. App. 21a. Bishay accordingly amended his counterclaim to include six counts, all of which were on the list that he had sent Citizens in October 1995: the two original counts, along with promissory estoppel, intentional interference with contractual and advantageous relations, request for declaratory relief with respect to the validity of a Forbearance Agreement, and intentional infliction of emotional distress. *Id.*

Citizens then moved for summary judgment with respect to the four counterclaims that had not been contained in Bishay's original answer, arguing that those counterclaims were barred by the doctrine of *res judicata*. Pet App. 21a. Bishay responded that the plan expressly reserves his claims and orders him to pay Citizens only "unless and until" Bishay obtains a favorable judgment against the bank in the state court litigation.

The Superior Court rejected Bishay's argument. Pet. App. 26a. The court took the position that "any reservation of a debtor's right to pursue rights and remedies outside of the bankruptcy proceeding must *specifically identify the cause of*

action reserved." *Id.* at 24a (emphasis added); see also *id.* at 26a (requiring "express and specific identification of the individual causes of action reserved"). In the Superior Court's view, "a blanket reservation that seeks to reserve all causes of action reserves nothing. To hold otherwise would eviscerate the finality of a bankruptcy plan containing such a reservation, a result at odds with the very purpose of a confirmed bankruptcy plan." *Id.* (quoting *D&K Props. Crystal Lake* v. *Mut. Life Ins. Co.*, 112 F.3d 257, 261 (CA7 1997)).

Applying this principle, the court ruled that "[t]he language of the reservation in the reorganization plan is far too broad and vague to prevent the Confirmation Order from constituting *res judicata.*" Pet. App. 26a. The court opined that the clause was particularly problematic with respect to three of the four counts at issue – the three counts that "are in the nature of defenses to Bishay's obligation to repay the debt owing to Citizens" and that thus "seek to litigate the validity of the Note and Forbearance Agreement" that, according to the Superior Court, "the Bankruptcy Court necessarily determined * * * were valid and enforceable" when it "order[ed] Bishay * * * to repay the obligation incurred pursuant to" those agreements. *Id.* at 27a.

3. Bishay appealed to the Massachusetts Appeals Court, which affirmed. Pet. App. 1a-10a. The court adopted the reasoning of the Superior Court:

> There is no merit in Bishay's argument that general or blanket type language in the reservation clause preserved his claims in the amended counterclaim. "A blanket reservation that seeks to reserve all causes of action reserves nothing. To hold otherwise would eviscerate the finality of a bankruptcy plan containing such a reservation, a result at odds with the very purpose of a confirmed bankruptcy plan."

Id. at 4a n.6 (quoting *D&K*, 112 F.3d at 261).

4. The Massachusetts Supreme Judicial Court denied Bishay's request for discretionary review. Pet. App. 35a. This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

The Massachusetts Appeals Court violated 11 U.S.C. 1123(b)(3)(B) by adopting a *per se* rule against enforcing any clause, in a Chapter 11 plan, that reserves all of a debtor's claims against a particular creditor. The decision below not only reads Section 1123(b)(3)(B) out of the Bankruptcy Code but also reads the reservation clause out of the confirmed plan. In this case, the rule worked a particularly manifest injustice because the creditor itself had drafted the clause and was acutely aware of Bishay's intention to pursue claims he had not yet filed. Moreover, the rule destroys the purpose for which Section 1123(b)(3)(B) was enacted, because it forces debtors to prolong federal bankruptcy proceedings – sometimes for years – while all claims are litigated before the bankruptcy court. The decision also deepens an entrenched three-way conflict among the courts, siding with the Sixth and Seventh Circuits but against (*inter alia*) the Eighth Circuit and the Supreme Courts of Virginia, Alaska, and Louisiana.

I. Certiorari is warranted because the Massachusetts Appeals Court's *per se* rule against enforcing clauses that reserve all claims is wrong.

A. The doctrinal and policy problems created by the Appeals Court's rule are legion. "The Code, the better-reasoned case law, and equitable considerations support giving effect to a plan provision containing a general reservation." *In re Weidel*, 208 B.R. 848, 853 (Bankr. M.D.N.C. 1997).

First, the decision below contradicts the express command of Congress that "a plan may * * * provide for * * * the retention and enforcement by the debtor * * * of any * * * claim or interest * * * belonging to the debtor or to the estate." 11 U.S.C. 1123(b)(3). "[T]here is nothing in the

provision to suggest that the plan must specifically identify each and every claim and/or interest belonging to the debtor that may be subject to retention and enforcement." *Cohen* v. *TIC Fin. Sys.*, 279 B.R. 145, 158 (Bankr. D. Del. 2002). Neither the Appeals Court nor any other court has pointed to any language in the statute or in its legislative history justifying a *per se* rule that a claim may be preserved only if it is identified specifically. To the contrary, the legislative history of Section 1123(b)(3) mirrors the statute itself in contemplating the retention of claims after plan confirmation: "The plan may also provide for the treatment of claims by the debtor against other entities that are not settled before the confirmation of the plan." H.R. REP. NO. 95-595, at 406-07 (1977).

Second, the Appeals Court violated a core principle of contract interpretation. "Because a [bankruptcy] plan is often more akin to a contract than a disputed order, general contract principles ought to be applied to its interpretation." *UNR Indus., Inc.* v. *Bloomington Factory Workers*, 173 B.R. 149, 157 (Bankr. N.D. Ill. 1994); see also *Cohen*, 279 B.R. at 160; *Peltz* v. *Worldnet Corp.*, 280 B.R. 573, 592 (D. Del. 2002). This Court has recognized the "cardinal principle of contract construction" that "a document should be read to give effect to all its provisions." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). The Appeals Court violated this rule by reading the reservation clause out of the contract entirely.

Third, the Appeals Court violated "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono*, 514 U.S. at 62. Bishay's reservation clause is clear and unambiguous; but even if it were not, its ambiguities should be resolved against the drafter — Citizens. In *Peltz*, the court enforced such a clause because, *inter alia*, "[p]rior to a plan's confirmation, creditors have the opportunity to examine the terms of the proposed plan and respond accordingly." 280 B.R. at 592. In *Bishay*,

the argument for giving effect to the clause is even stronger because Citizens actually drafted it.

The ruling of the Appeals Court is all the more difficult to justify in light of the fact that Citizens itself viewed the clause as preserving all of Bishay's claims. Citizens left the clause out of the plan it proposed initially, but "the Chapter 11 Trustee [would] not support [that] plan because * * * he believe[d] it's unconfirmable due to the treatment of Bishay's claims against Citizens (i.e. they are extinguished)." Memo of R.M. Barry to Citizens Bank of 3/13/96, at 3. Fearing that if "the Trustee oppose[d] Citizens' plan, it might be difficult for the judge to confirm the plan," Citizens concluded that it "shouldn't jeopardize confirmation of our plan over the settlement of Bishay's claims." *Id.* at 3-4. Citizens thus understood perfectly that the modified plan it submitted would leave the bank "defending against Bishay's claims." *Id.* at 4. The bank acknowledged in its Disclosure Statement that those claims included the ones on the comprehensive itemized list that Bishay had given Citizens in October 1995. Indeed, the bankruptcy court ordered Bishay to post $500,000 as security for costs Citizens might incur in defending against Bishay's claims.[2] Citizens included the reservation clause as part of the typical strategic decisionmaking or bargained-for exchange that is characteristic of contract formation. The Appeals Court unjustifiably interfered with that process to protect a party that needed no protection — the creditor/drafter.

The lone justification offered by the Appeals Court for its decision — *viz.*, that giving effect to a general reservation clause "would eviscerate the finality of a bankruptcy plan" (Pet. App. 4a n.6 (quoting *D&K*, 112 F.3d at 261)) — is

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[2] The Massachusetts Superior and Appeals Courts inexplicably awarded $430,000 out of the $500,000 to Citizens while prohibiting Bishay from bringing the very claims for which the money was earmarked as a defense fund.

without merit. The finality of a plan is undermined no more by a reservation clause preserving all claims against a particular creditor than by a clause reserving specific claims. In this case, Citizens knew precisely which claims Bishay intended to make, because he had notified the bank of those very claims in his letter of October 1995 (containing the itemized list of claims). Citizens convinced the bankruptcy court to order Bishay to set aside $500,000 for Citizens' legal fees in defending those claims. Citizens thus knew, at the time the bankruptcy plan was confirmed, precisely the litigation prospects it faced — just as it would have if the reservation clause had listed specific claims. This set of circumstances occurs often in cases involving general reservation clauses: The creditor understands the scope of the claims it faces because it is intimately familiar with the details of its own conduct.

In addition, the adoption of the *per se* rule by the courts below cannot be squared with the Superior Court's decision, endorsed by the Appeals Court (Pet. App. 3a), to permit Bishay's two pre-confirmation counts to go forward. Even if those two claims were "independent claims which could be characterized as a set-off to Bishay's debt" whereas the four later claims were "in the nature of defenses to Bishay's obligations under the note" (*id.*), that distinction is irrelevant. Both state courts below took the position that "[t]he application of res judicata to a bankruptcy court order confirming a Chapter 11 reorganization plan generally bars later proceedings on *all claims and issues concerning the debtor-creditor relationship* that were actually raised during the confirmation process *as well as those that could have been raised.*" Pet. App. 2a (emphasis added) (alteration omitted). Bishay's two pre-confirmation claims clearly "concern[ed] the debtor-creditor relationship" and "could have been raised" before the bankruptcy court. Had the Superior Court and Appeals Court actually believed the logic behind their own rule, they would have deemed *all* of Bishay's six claims to be barred by *res judicata.*

Finally, there is no merit in the Appeals Court's suggestion that the four counts Bishay added to his counterclaim after confirmation were necessarily adjudicated by the bankruptcy court's order. See Pet. App. 3a-5a; see also *id.* at 27a. The bankruptcy court provided precisely the opposite. The plan that the bankruptcy court confirmed characterized Citizens' claims against Bishay as "impaired" by Bishay's reserved claims and decreed that Bishay had to pay Citizens only "until and unless" his obligations were reduced by an offsetting judgment against Citizens in the pending state court litigation. Even the Massachusetts Superior Court acknowledged that the bankruptcy court had issued an order appointing Bishay as representative of the debtor's estate so as to permit him to "pursue the present litigation." Pet App. 26a n.21. Neither Citizens nor the Massachusetts courts can offer any explanation why the bankruptcy court would order Bishay to set aside $500,000 for Citizens' defense costs if that court believed the bank would have to defend only the two pre-confirmation counts of Bishay's counterclaim.

B. The question presented is vital to the orderly administration of the bankruptcy system. "Obviously, if it is necessary to identify completely and disclose the intent with regard to each avoidance action in order to preserve it properly, then the Bankruptcy Code's goal of a quick and orderly confirmation may be substantially derailed." C. Wesley Vines and Vernon O. Teofan, *The Preservation and Prosecution of Avoidance Actions Post-Confirmation*, 12 BANKR. DEV. J. 735 (1996). The reason is that "the confirmation process is expedited by allowing debtors to include a general reservation of their right to pursue certain causes of action at a later date." *Cohen*, 279 B.R. at 159; see also *In re Weidel*, 208 B.R. 848, 853 (Bankr. M.D.N.C. 1997). The federal bankruptcy court in *Cohen* gave a detailed explanation of the problem:

> [I]n large chapter 11 cases, the investigation and litigation of all possible avoidance actions to final

> judgment can take years. To force the debtor to remain in bankruptcy until a final determination of all possible preference actions is made would act as a detriment to both the debtor and its creditors by slowing down the reorganization process. In most of the large chapter 11 cases in this Court, the plan of reorganization and/or liquidation is often confirmed before the debtor and/or a trustee has undertaken a detailed investigation of the potential preference actions. In large Chapter 11 cases there may be hundreds or even thousands of transaction[s] within the 90-day period and considerable time and effort is needed to examine those transactions in light of the numerous defenses provided for in § 547(c). More often than not, it is appropriate to delay that undertaking until after plan confirmation.

279 B.R. at 159; see also *Peltz*, 280 B.R. at 591.

"[The] aim [of section 1123(b)(3)(B)] was to make possible the formulation and consummation of a plan before completion of the investigation and prosecution of causes of action." *Acequia, Inc.* v. *Clinton*, 34 F.3d 800, 808 (CA9 1994)). "Clearly, it is not always possible to complete an investigation of a potential preference action prior to what might otherwise be the appropriate time to seek confirmation." Vines & Teofan, 12 BANKR. DEV. J. at 761. As in ordinary civil litigation, a party to a bankruptcy proceeding may not be able to learn of all potential claims until the process of discovery has begun. Prohibiting debtors from reserving all claims thus creates the injustice of extinguishing claims the debtor *could not* have identified specifically at the time the plan was confirmed.

For this reason, parties to a bankruptcy proceeding cannot use clever drafting to escape the problem created by the Appeals Court's *per se* rule. Even a debtor aware of the rule would know that he might well be unable to identify, before completing an investigation, every claim he possesses

against a creditor. As a result, the debtor's only recourse is to litigate and investigate all claims fully before the bankruptcy court confirms the plan. This is precisely the outcome that Congress enacted Section 1123(b)(3)(B) to avoid.

The Appeals Court's decision thus imposes a hefty burden upon the federal bankruptcy courts. In *every* Chapter 11 case, the debtor will potentially have claims he could pursue against a creditor. The *per se* rule adopted in *Bishay* forces all such debtors to drag out the bankruptcy proceedings – delaying the date that creditors are repaid, that the reorganized debtor can start anew, and that the bankruptcy court can move on to other cases – while they investigate as many potential claims as they can manage to foresee.

II. Certiorari is warranted because the question presented is the subject of an intractable split in the federal and state courts.

"There is much disagreement with regard to the degree of specificity required by section 1123." Vines & Teofan, 12 BANKR. DEV. J. at 757. "The courts are divided on how specific the language of retention and enforcement must be under § 1123(b)(3)(B) to adequately reserve a cause of action for adjudication at a later date." *Cohen*, 279 B.R. at 157; *Peltz*, 280 B.R. at 589. In particular:

> The majority of courts that have examined this issue have held that for this exception [to *res judicata*] to apply, the plan must expressly reserve the right to pursue *that particular claim* post-confirmation and that a blanket reservation allowing for an objection to *any claim* is insufficient.
>
> * * *
>
> A minority of courts, however, have held that a plan provision containing a general reservation of "the right to object to claims following confirmation and for extending the time for doing so" is sufficient to overcome the *res judicata* bar.

Tracar v. *Silverman*, 266 B.R. 273, 277-78 (Bankr. E.D.N.Y. 2000) (emphasis in original) (citations omitted) (quoting *In re Weidel*, 208 B.R. at 853).

Courts have specifically staked out three different positions: a *per se* rule enforcing only clauses that reserve specifically identified claims; a middleground approach enforcing a clause reserving all claims so long as the debtor has otherwise notified the creditor of his intention to pursue post-confirmation claims, including by naming the creditor in the reservation clause; and a *per se* rule enforcing all clauses that reserve all claims. Petitioner would have prevailed under either of the latter two rules.

The Massachusetts Appeals Court took the first approach, adopting a *per se* rule against enforcing a general clause: "A blanket reservation that seeks to reserve all causes of action reserves nothing." Pet. App. 4a n.6 (quoting *D&K*, 112 F.3d at 261). The Sixth and Seventh Circuits agree. *D&K*, 112 F.3d at 260-61; *Browning* v. *Levy*, 283 F.3d 761, 774 (CA6 2002); *Micro-Time Mgmt. Sys., Inc.* v. *Allard & Fish, P.C.*, 983 F.2d 1067 (CA6 1993) (Table), 1993 WL 7524 (unpublished disposition), *cert. denied*, 510 U.S. 906 (1993)).[3] Both state and federal courts have followed the *per se* approach of the Sixth and Seventh Circuits. See *Tracar*, 266 B.R. at 277-79; *Rainbow Trust* v. *Moulton Constr., Inc.*, 200 B.R. 785, 788 (Bankr. D. Vt. 1996); *Truesdell* v. *Donaldson, Lufkin & Jenrette Secs. Corp.*, 281 A.D.2d 334, 335 (N.Y. App. Div. 2001).

The Eighth Circuit and the Supreme Courts of Virginia, Alaska, and Louisiana have taken a middleground approach under which Bishay would have been allowed to pursue his

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[3] The Sixth Circuit's decision in *Micro-Time* is "[u]npublished yet increasingly cited" and was relied upon in *D&K*, in *Browning*, and in other cases because "[t]he Sixth Circuit rules place no limitation on citation to unpublished opinions by courts." *D&K*, 112 F.3d at 260 n.2.

claim because Citizens was aware of the claims Bishay intended to assert. This approach characterizes a reservation clause as a tool for ensuring that the creditor is notified of the debtor's intention to bring future claims. The courts taking this view thus require that *either* "the reservation language [must] expressly preserve specific claims *or* * * * the facts and circumstances [must] clearly show that the parties intended to preserve specific claims for later adjudication." *Bill Greever Corp.* v. *Tazewell Nat'l Bank*, 256 Va. 250, 256 (Va. 1998) (emphasis added). See *Harstad* v. *First Am. Bank*, 39 F.3d 898, 902-03 (CA8 1994) ("[T]he creditors are entitled to know if the debtors intend to pursue the preferences in post-confirmation actions," not merely "that the availability of such claims was being investigated."); *Greever*, 256 Va. at 256-57; *Tope* v. *Christianson*, 959 P.2d 1240, 1245-47 (Alaska 1998) ("TEC's reorganization plan and disclosure statement did not reveal its intent to reserve the counterclaim."); *Terrebonne Fuel & Lube, Inc.* v. *Placid Ref. Co.*, 666 So.2d 624, 634-35 (La. 1996) (enforcing a general reservation clause where "the parties and the court were aware that these claims would be asserted later"). *Harstad*, *Greever*, *Tope*, and *Terrebonne* all involved general reservation clauses like the one in *Bishay*. The courts in *Harstad*, *Greever*, and *Tope* ruled that the debtors had failed to preserve their claims because they had not sufficiently supplemented their general reservation clauses with other means of notifying the creditors; whereas the court in *Terrebonne* enforced the general clause because it was so supplemented. Like the debtor in *Terrebonne* and unlike the debtors in *Harstad*, *Greever*, and *Tope*, Bishay informed his creditor in unmistakable terms of the claims he intended to bring in state court after the Chapter 11 plan was confirmed.

A third group of courts has adopted a *per se* rule enforcing general reservation clauses like the one in *Bishay* — a rule under which Bishay would of course have been allowed to pursue his claims. See *Cohen* v. *TIC Fin. Sys.*, 279 B.R. 145, 156-62 (Bankr. D. Del. 2002); *Peltz* v.

Worldnet Corp., 280 B.R. 573, 589-94 (D. Del. 2002); *In re Weidel*, 208 B.R. 848, 852-53 (Bankr. M.D.N.C. 1997); *Envirodyne Indus., Inc.* v. *Conn. Mut. Life Co.*, 174 B.R. 986, 991 (Bankr. N.D. Ill. 1994); see also *Acequia, Inc.* v. *Clinton*, 34 F.3d 800, 807-08 (CA9 1994); *Appletree Square I Ltd. P'ship* v. *O'Connor & Hannan*, 575 N.W.2d 102, 104-05 (Minn. 1998).

Certiorari is accordingly warranted in order to resolve the entrenched three-way conflict regarding whether to give effect to clauses, in Chapter 11 bankruptcy plans, that reserve all claims of the debtor against a creditor.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 7, 2003

CITIZENS BANK OF MASSACHUSETTS,
Plaintiff-Appellee,
v.
BAHIG BISHAY,
Defendant-Appellant.

No. 00-P-798

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

Oct. 22, 2002

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

This appeal by the defendants (collectively Bishay), is from the entry of a judgment ordered in 1999 by a Superior Court judge in favor of Citizens Bank for $360,427.99 for attorney's fees and costs which were allowed as reasonable collection costs relating to a loan made to Bishay in 1988 (A.4225, 4229). Bishay also appeals from three prior summary judgment orders of the same judge which dismissed his counterclaims against Citizens Bank related to its collection of the loan (A.4230). The loan was repaid through a proceeding in the United States Bankruptcy Court, concluded pursuant to a confirmatory order issued in 1996 (A.288, 4230).

In this appeal, Bishay principally presents the issue whether, and to what extent, his rights were preserved in the bankruptcy proceeding to pursue his counterclaims against Citizens Bank in the Massachusetts courts (B.Br.3-4). He argues that the Superior Court judge's rulings, principally based on res judicata grounds, did not reach the full extent of those claims and thereby deprived him of his day in court. We conclude the judge's decisions were correct and affirm.

Citizens Bank commenced this action in June, 1995, by filing a verified complaint in the Superior Court (A.19). Bishay's answer contained a counterclaim in two counts, the first alleging a breach of good faith and fair dealing, and the second an alleging unfair trade practices under G.L. c. 93A (A.70,74). Bishay then filed two voluntary petitions in bankruptcy, the first in July, 1995, for 1095 Commonwealth Ave. Corp., and the second, individually, in September, 1995, which subsequently were consolidated for administration (A.218). The plan, confirmed by order of the Bankruptcy Court in April, 1996, permitted Bishay to pursue his counterclaim.[1] After Citizens Bank moved in the Superior Court to dismiss the counterclaim in June, 1996, Bishay moved to amend it, and the amendment was allowed by a motion judge in November, 1996 (A.690), resulting in a counterclaim of six counts (A.692- 726). Four decisions by a different Superior Court judge followed, resulting in the dismissal of Bishay's entire amended counterclaim and the award of collection costs to Citizens Bank.

1. *Application of res judicata.* In the first of the Superior Court orders challenged by Bishay in this appeal, the judge considered the parties' cross motions for summary judgment on Bishay's several counts in the amended counterclaim (A.2205,2216). The judge correctly stated the controlling principle as follows: "The application of res judicata to a bankruptcy court order confirming a Chapter 11 reorganization plan generally bars later proceedings on all claims and issues concerning the debtor-creditor relationship that were [actually raised during the confirmation process as well as those that could have been raised]...." (A.2219). See *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 978 & n.8 (1st Cir. 1995) (res judicata principles applicable to

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[1] The plan allowed Citizens Bank's claim for payment of the loan balance and also allowed retention of a lien on Bishay's assets to permit recovery of attorney's fees and costs in defending against Bishay's counterclaim (A.279-280).

confirmation orders of a bankruptcy court). "Under a generally accepted exception to the *res judicata* doctrine, a party's claims are not precluded by a prior action if the court in that action expressly reserves those claims for later adjudication. *Apparel Art Intern. v. Amertex Enterprises[, Ltd.]*, 48 F.3d 576, 586 (1st Cir. 1995). *D & K Properties Crystal Lake v. Mutual Life Ins. [Co.]*, 112 F.3d 257, 260 (7th Cir. 1997)." (A.2220).

The judge reviewed the relevant language in the reservation clause of the plan confirmed by the Bankruptcy Court,[2] correctly concluding from its wording and the record in that court that the original two counts in Bishay's counterclaim had not been adjudicated in that court and had been preserved so as to survive the confirmation order. Moreover, he stated those two counts "constitute independent claims which could be characterized as a set-off to Bishay's debt." (A.2222).

In contrast, however, the judge concluded that the additional four claims in the amended counterclaim[3] were in the nature of defenses to Bishay's obligations under the note, and that he essentially sought to relitigate the validity of that

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[2] "The Debtors' estates may retain, and by its duly authorized representative(s) settle, release or prosecute, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the 'Alleged Claims')." (A.280).

[3] We adopt the judge's summary description of the counts as follows: (I) allegations of "numerous breaches of [Citizens Bank's] express and implied duties" under the note and a forbearance agreement; (II) a claim that Citizens Bank is "estopped from treating the Note as a demand obligation and collecting the full amount"; (III) first count of prior counterclaim restated; (IV) a request for a declaratory judgment that the "Note and Forbearance Agreement are extortionate," and all payments should be ordered disgorged; (V) a claim of intentional infliction of emotional distress; and (VI) second count of prior counterclaim restated. (A.2222- 2224; 712-724).

note and the forbearance agreement.[4] These additional claims were not expressly identified in the reservation clause, the

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[4] There is no merit in Bishay's argument that general or blanket type language in the reservation clause preserved his claims in the amended counterclaim. "A blanket reservation that seeks to reserve all causes of action reserves nothing. To hold otherwise would eviscerate the finality of a bankruptcy plan containing such a reservation, a result at odds with the very purpose of a confirmed bankruptcy plan." *D & K Properties Crystal Lake v. Mutual Life Ins. Co.*, 112 F.3d at 261.

Bishay's assertion that classification of Citizens Bank's claim as "impaired," means that approval of the claim was not final (B.Br.18), is without merit. That assertion ignores the plain language of section 6(a) of the reorganization plan which required full payment of the loan balance on or before December 27, 1996 (A.279). Further, no reasonable reading of 11 U.S.C. § 1124 (1984) supports that assertion.

There also is no merit in Bishay's assertion that he should receive a more favorable interpretation of the reservation clause because it was drafted by Citizens Bank. Compare *Union Carbide Corp. v. Newboles*, 686 F.2d 593, 595 (7th Cir. 1982) (approval of a plan by a creditor "cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings, simply because the gamesmanship imported from state contract law into the bankruptcy proceedings would be intolerable"). Moreover, there is no indication that Bishay did not have adequate opportunity to contest the plan or seek its modification.

Similarly, there is no merit in Bishay's request that we consider statements made by counsel for Citizens Bank at the confirmation hearing (B.Br.20-23). Compare *Sure-Snap Corp. v. State Street Bank & Trust Co.*, 948 F.2d 869, 873 (2d Cir. 1991) (even comments by a judge in a colloquy with debtors were "not dispositive of ... allegedly reserved right," and did not affect application of res judicata principles). In the judge's third decision he stated, "Bishay now asks this Court yet again to adopt his interpretation of the reservation [clause]. This the court declines to do." (A.3392). We similarly decline any invitation by Bishay to

bankruptcy schedules (A.3224-3267), or in the previously filed counterclaim in Bishay's answer to Citizens Bank's complaint.[5] Because the Bankruptcy Court ordered the payment of Citizens Bank's claim, inherent in that order is the court's determination of the validity and enforceability of the note and forbearance agreement. The judge therefore properly stated that "[f]inal orders of the bankruptcy court are res judicata as to all matters that were or could have been litigated before the bankruptcy court," see *Federal Deposit Ins. Corp. v. Shearson-American Exp., Inc.*, 996 F.2d 493, 497 (1st Cir. 1993), *cert. denied*, 510 U.S. 1111 (1994), and correctly concluded that the confirmation order had res judicata effect as to counts I, II, IV, and V of Bishay's amended counterclaim (A.2219,2224).[6]

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consider any reinterpretation by reading any "intent" into the reservation clause (see B.R.Br.2-8).

[5] The judge noted that the Bankruptcy Court allowed a joint motion on September 4, 1996, authorizing Bishay to employ special counsel to pursue the litigation then pending in the Superior Court, No. 95-1312A (A.2222 n.10).

There is no merit in Bishay's assertion that the counts in his amended counterclaim were preserved because his proposed version of that counterclaim was attached to a stipulation filed in the Bankruptcy Court with respect to a fee dispute. That filing occurred before the joint motion was allowed, and there is no indication that the amended counterclaim was brought within the scope of that motion.

In any event, the amended counterclaim was first filed in the Superior Court in August, 1996, some four months after the confirmation order dated April 23, 1996 (A.294), and after the expiration of the applicable bankruptcy appeal period. Bishay did not appeal the confirmation order.

[6] The judge subsequently denied Bishay's two motions for reconsideration of these rulings in his second and third decisions (A.2481-2482, 3391-3395).

2. *The surviving claims in the amended counterclaim.* Bishay seeks to pursue his dismissed amended count III and most of the count VI claims by raising events which occurred after the general release in a September 16, 1994, forbearance agreement he executed.[7] He argues that these counts were preserved by the reservation clause, and he asserts that the judge improperly dismissed those claims, essentially ignoring the effect of the release and res judicata (B.Br.27-48).[8]

Bishay asserts that in 1995, Citizens Bank's refusal to accept full payment of the loan constituted (1) a breach of its obligations to him; (2) interfered with his business obligations; and (3) violated c. 93A (B.Br.31).[9] Even if we

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[7] In his first decision, the judge addressed Citizens Bank's contention that the general release served as a defense to count III and so much of count VI concerning events occurring prior to the release, and Bishay's claim that the release was not binding because he signed it under economic duress (A.2225). The judge's conclusion that Bishay's failure timely to object to the forbearance agreement, his subsequent conduct in accepting the benefits of Citizens Bank's forbearance, and his partial performance in making sporadic payments, constituted ratification of the agreement. The judge further concluded that because the general release was valid and binding, Bishay is precluded from asserting any claim against Citizens Bank arising from their relationship prior to September 16, 1994, and allowed summary judgment for Citizens Bank on count III and subsections a, b, c, d, e, g, h, and i of count VI (A.2229).

[8] In the judge's second decision, he declined to reconsider his prior rulings on count III after Bishay filed a motion for reconsideration and submitted a joint stipulation which contained a proposed amended counterclaim. The judge rejected consideration of Bishay's claims alleging interference with contractual relations after the September 16, 1994, release, and declined to alter his ruling that only the two claims pending in the Superior Court at the time of the bankruptcy confirmation order had been preserved (A.2477-2479, 2481-2482).

[9] The related factual background is that after filing the bankruptcies, in November, 1995, Bishay asked what terms

were to consider those claims not barred by the release and res judicata principles, they lack merit. In summary, (1) at the time in issue, there is no indication that Bishay ever tendered any payment or actually had a commitment for financing from another lender, and in indicating its intent to require a release, in the circumstances, Citizens Bank was not in breach of any obligation to Bishay; (2) no claim of interference could arise because Citizens Bank did not induce anyone to act unfavorably toward Bishay or impede his performance; and (3) the Bankruptcy Court's determination that the release of claims was proper thus precludes the c. 93A claim to the extent that it was based on Citizens Bank's collection efforts. Also, Bishay's argument (B.Br.36-44) attempting to revive his claim for intentional infliction of emotional distress and his unsupported characterization of Citizens Bank's conduct as unethical, oppressive, and unscrupulous and violative of c. 93A, fail to raise genuine issues of material fact.

With respect to Bishay's c. 93A argument (B.Br.45-48) based on Citizens Bank's two-tiered billing arrangement with its attorneys, for which it was sanctioned in the Bankruptcy Court (A.1310-1350), Bishay asserts that a causal relationship existed between that arrangement and Citizen Bank's refusal to accept payment of the loan in 1995, and contrary to the judge's conclusion, that he suffered damages. There is nothing in this assertion warranting disturbing the judge's careful analysis, concluding Bishay has no reasonable expectation of demonstrating that his alleged damages were

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Citizens Bank would require to discharge all its security for the defaulted loan if he could obtain financing to repay the loan. The response was that a release of all theoretical claims would be required (A.642-646). Bishay claims the collateral then securing the loan balance of $2.4 million was, disproportionally, worth $18 million (B .Br.30).

caused by Citizens Bank's involvement in the two-tiered fee arrangement (A.3396-3398).[10]

3. *Award of attorney's fees.* In his fourth decision, and after a thorough analysis of the parties' claims, the judge determined that Citizens Bank had a right to recover $360,427.99 in attorney's fees and costs incurred as the reasonable costs of collection of the loan from April 25, 1996, through November 30, 1998 (A.4224). Bishay claims that the note was paid "some time before a substantial part of those legal fees were incurred," and accordingly when the note was paid, the fees incurred thereafter could not constitute reasonable fees for "collection and enforcement" of the note (B.Br.49). Arguing this point for the first time in this appeal (see memorandum in opposition to summary judgment at A.3702-3721), Bishay is not entitled to consideration of that argument in this court. See *Royal Indem. Co. v. Blakely*, 372 Mass. 86, 87-88 (1977).

In any event, Bishay fails to show that the language of the note (A.32), his guarantees (A.40,44,56), or the relevant provisions of the Bankruptcy Court's approval of a lien on his assets (A.280), restricted his contractual obligations after the note was paid. He also fails to show how the fees awarded were not related to litigation arising out of the collection process, or that there was any error in the judge's thorough

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[10] Acting on a motion of Citizens Bank for reconsideration, the judge addressed the c. 93A issues raised in subsections f and k of count VI in his third decision (A.3396). He concluded that Bishay had not suffered any monetary loss in the course of the Bankruptcy Court's resolution of the two-tiered fee issue. He explained that "the amount of fees owed by Bishay was reduced to reflect the amount Citizens [Bank] itself would have paid its attorneys for the work. Moreover, the attorney's fees and expenses Bishay incurred in challenging the dual billing arrangement were set off against the fees he owed Citizens [Bank] under the loan agreement." (A.3397).

analysis of the course of this litigation (A.4216-4224).[11] The judge properly concluded that "Bishay vigorously pursued his purported $100 million counterclaim against [Citizens Bank] to no avail, despite his clear contractual obligation to pay ... collection costs in the event his claim was unsuccessful." (A.4224). Although Citizens Bank's claim with respect to the unpaid loan balance was satisfied on December 27, 1996,[12] because Citizens Bank's complaint and Bishay's counterclaim then were pending in the Superior Court, it cannot be said that the parties had reached an end to all "charges of the holder ... in connection with the collection and enforcement of [the note]." (A.32). Bishay's counterclaim was grounded in allegations of improper conduct by Citizens Bank in collecting the note, which Bishay not only pressed after the note had been paid, but had he been successful, he essentially would have overturned the validity of Citizens Bank's collection of the note. Citizens Bank incurred additional fees and costs in withstanding Bishay's continuing attack on the validity of its collection of the note, and those fees and costs properly were an integral part of the collection process. Compare *Penney v. First Natl. Bank of Boston*, 385 Mass. 715, 723 (1982) (attorney's fees and costs incurred by bank in defending against debtor's action brought after sale of

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[11] The judge noted that the fees requested represented nearly two thousand hours of work, that Bishay asserted a counterclaim he valued at $100 million, involving complex issues of bankruptcy law, res judicata, contract, and c. 93A, and the filing of over one hundred pleadings. He stated that "every point on every issue was vigorously contested by both parties," and that Citizens Bank ultimately succeeded in obtaining judgment in its favor on Bishay's entire counterclaim (A.4220).

[12] The Bankruptcy Court order regarding discharge of debtors states in relevant part: "In accordance with the terms of the Confirmed Plan, all claims of creditors were satisfied in full on December 27, 1996 with the exception of certain legal fees and costs of Citizens Bank...." (A.3070-3071).

debtor's collateral "were an integral part of the collection process").[13] See *Leventhal v. Krinsky*, 325 Mass. 336, 342 (1950); *Covich v. Chambers*, 8 Mass.App.Ct. 740, 752 (1979).

4. *Costs incurred after judgment and in this appeal.* Citizens Bank requests attorney's fees and costs it claims were allowed in the Superior Court, and to March 17, 1999, when the award was entered (C.B.Br 45-46). Because this request concerns matters beyond our purview in another court, we decline to consider the request. Citizens Bank may, however, request its attorney's fees and costs in connection with this appeal by filing a petition with this court, together with the necessary back-up materials, within fifteen days of the issuance of the rescript in this case. Bishay shall have ten days to respond to that submission, in accordance with *Yorke Mgmt. v. Castro*, 406 Mass. 17, 20 (1989).

Judgments affirmed.

By the Court (Jacobs, Cypher, & Kantrowitz, JJ.)

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[13] Bishay no longer challenges the judge's conclusion that Citizens Bank was entitled to $117,765.24 in fees as a prevailing party in connection with its first motion for summary judgment, an amount which was included in the total award (A.4223-4224).

CITIZENS BANK OF MASSACHUSETTS,
Plaintiff,
v.
BAHIG BISHAY & others,
Defendants.

No. CIV.A. 95-1312A
SUPERIOR COURT OF MASSACHUSETTS
Nov. 24, 1997

MEMORANDUM OF DECISION AND ORDER ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

The plaintiff, Citizens Bank of Massachusetts (Citizens), brought this action in an attempt to recover more than $1.5 million owed by defendant Bahig Bishay and various trusts and corporations controlled by him under a defaulted promissory note. This debt has since been repaid as a result of a Chapter 11 plan confirmed by the Bankruptcy Court on April 23, 1996. However, numerous counterclaims by Bishay against Citizens remain pending in this action. This matter is before the court on the parties' cross-motions for summary judgment pursuant to Mass. R. Civ. P. 56(c). For the reasons discussed below, Citizens' motion for summary judgment is *ALLOWED* in part and *DENIED* in part. Further, the defendants' cross-motion for partial summary judgment is *DENIED*.

BACKGROUND

The undisputed facts as revealed by the summary judgment record are as follows. The defendant Bahig Bishay (Bishay) is the president and founder of Bishay Motors and Leasing, Inc. f/k/a Bishay Motors, Inc. (Bishay Motors), a business that sells, leases and services Mercedes Benz and

other luxury automobiles in East Walpole, Massachusetts. Bishay is a trustee and beneficiary of the Old Post Realty Trust (Old Post Trust), which holds 13.5 acres of registered land located on Old Post Road in Sharon and Walpole, Massachusetts. Bishay is also a trustee and beneficiary of the Commonwealth Realty Trust (Commonwealth Trust), which holds eight parcels of land on or near Commonwealth Avenue in Boston, Massachusetts.

Bishay transacted a great deal of financial business with Citizens' predecessor in interest, Neworld Bank (Neworld), including the borrowing of a line of credit to fund inventory for Bishay Motors and to support his numerous real estate investments. On June 8, 1988, Bishay obtained a loan from Neworld in a principal amount of $2,560,000, as evidenced by a Note and Credit Agreement. The Note, which is dated June 8, 1988 and entitled "Demand Note", provided in relevant part:

> For value received, I, Bahig Bishay of Westwood, Massachusetts, (hereinafter called "Maker") promise to pay, ON DEMAND, to NEWORLD BANK FOR SAVINGS ... the lessor [sic] of (a) $2,560,000.00 or (b) the aggregate amount of all loans outstanding by Payee under the Credit Agreement (the "Credit Agreement") of even date between the Payee and the Maker together with all interest due thereunder and all other charges due Payee.
>
> Until demand for payment in full is made, this Note shall be paid as follows: interest only from the date of disbursement hereunder ... which interest shall be payable monthly in arrears commencing on July 8, 1988, and on the 8th day of each month thereafter until demand for payment in full is made at which time the entire principal balance, accrued interest, and such other charges as may be due and payable hereunder or under any other instrument given to secure payment hereof, shall be immediately due and

payable....

The Maker agrees to pay all charges of the holder hereof in connection with the collection and enforcement of this Note, including reasonable attorneys' fees.

The Credit Agreement of the same date, entitled "Credit Agreement (Revolving Demand)," provided in relevant part:

Subject to the terms and conditions hereof, and until demand for payment in full is made, the Borrower may from time to time not later than June 8, 1989 borrow, repay and borrow from the Bank and the Bank will make such advance of funds (a "Loan," or collectively "Loans") to the Borrower not exceeding in the aggregate of $2,560,000.00 at any one time outstanding (the "Credit Availability") in such amounts, and for such duration as Borrower shall have specified to Bank in a Loan Request. In any event all amounts due Bank unless sooner demanded by Bank, shall be paid on or before June 8, 1989....

Upon the occurrence of one or more of the defaults above specified, at any time thereafter while such Event of Default is continuing, the Bank may by notice in writing to the Borrower declare the Note to be, and it shall thereupon become, forthwith due and payable together with all accrued interest to such date and any and all changes to which the Bank would be entitled hereunder, without presentment, demand, protest or other notice of any kind, all of which are hereby expressly waived.

The Note and Credit Agreement were secured by unlimited and unconditional guaranties from Bishay Motors, Old Post Trust, and Commonwealth Trust. Each guaranty provided in relevant part:

Upon any default by the Borrower in the full and punctual payment and performance of the Obligations, the liabilities and obligations of the Guarantor

> hereunder shall, at the option of the Bank, become forthwith due and payable to the Bank without demand or notice of any nature, all of which are expressly waived by the Guarantor. Payments by the Guarantor hereunder may be required by the Bank on any number of occasions....
>
> The Guarantor further agrees, as the principal obligor and not as a guarantor only, to pay to the Bank forthwith upon demand, in funds immediately available to the Bank, all costs and expenses (including court costs and legal expenses) incurred or expended by the Bank in connection with this Guaranty and the enforcement hereof, together with interest on amounts recoverable under this Guaranty from the time such amounts become due until payment at the usual rate charged by the Bank in similar circumstances, but in no event less than 12% per annum....

The Note and Credit Agreement were further secured by a mortgage on real estate located at 75 Providence Highway in East Walpole, Massachusetts, the site of Bishay Motors, and a security interest in all assets of Bishay Motors.

Pursuant to the Credit Agreement, the entire debt became due and payable to Neworld on June 8, 1989, but Bishay failed to repay the loan by this date. Neworld thus entered into an agreement with Bishay on December 18, 1989 that extended the time for repayment so long as Bishay reduced the line of credit by at least $1,700,000 by May 31, 1990. On May 31st, the parties entered into another extension agreement in which Neworld extended the time for repayment to August 31, 1990, in exchange for Bishay's grant of additional security for the loan: a first mortgage on 13.5 acres of registered land located on Old Post Road in Sharon and Walpole, a second mortgage on his automobile dealership at 1095 Commonwealth Avenue in Boston, and a second mortgage on property located at 5 Station Street in Brookline.

In November of 1990, Neworld informed Bishay via letter that it intended to terminate its lending relationship with him through repayment of the loan.

Thereafter, on March 15, 1991, Neworld entered into an agreement that extended the time for repayment of the loan until December 31, 1991 but required Bishay to make monthly principal payments of $5,000. According to Neil T. O'Hurley (O'Hurley), the direct account officer who represented Neworld in its dealings with Bishay, this extension agreement converted Bishay's line of credit from an "evergreen loan"[1] to a non-revolving term loan requiring monthly amortization of $5,000. Neworld and Bishay then entered into a series of additional agreements, each of which further extended the time for repayment of the loan.[2]

On August 10, 1993, Neworld and Bishay entered into yet another agreement extending repayment until June 30, 1994 but increasing the monthly principal repayments from $5,000 to $7,500. The following month, Bishay paid interest in the amount of $6,088.63 but requested a hold on the monthly principal reduction of $7,500. Thereafter, on April 18, 1994, Bishay wrote to O'Hurley and informed him that he was enclosing an interest payment of $14,058.91 but could not make the monthly principal reduction payments for May and June due to the cash flow shortfall caused in starting a new Isuzu business. O'Hurley responded by informing

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[1] This term is generally used in the banking industry to mean a loan essentially set up to require repayment of interest only, with no formal principal repayment schedule implemented. According to O'Hurley, granting Bishay an evergreen loan arrangement was unusual under the circumstances because his collateral structure was a pool of corporate business assets and commercial real estate, which is high risk.

[2] A December 27, 1991 agreement extended repayment until 6/30/92; a July 8, 1992 agreement extended repayment until 12/31/92; and a December 30, 1992 agreement extended repayment until 6/30/93.

Bishay that he was in default of the August 6, 1993 agreement due to his failure to make the required principal payments.

Plaintiff Citizens Bank acquired Neworld Bank on April 14, 1994. On May 9, 1994, Citizens sent Bishay a letter stating that his failure to make the monthly principal payments was a default under the parties' extension agreement and informing him that Neworld's merger with Citizens did not affect his obligations under said agreement. The letter further stated that Citizens reserved all rights under the agreement and that Bishay's obligations were due in full on June 30, 1994.

When Bishay failed to make the April and May principal payments, his account was turned over to Robert Bender (Bender) of Citizens' loan workout group. Bishay informed Bender that he was attempting to refinance a first mortgage held by the FDIC on the 1095 Commonwealth Avenue property, which the FDIC had agreed to release at a 50% discount, and requested that Citizens loan him sufficient funds for this purpose. Citizens refused this request, and by certified letter dated June 14, 1994, accelerated the Note and made demand on Bishay and all other guarantors for immediate payment of all sums due under the Note and all related agreements. At that time, the Note had an unpaid principal balance of $2,330,660.25 and outstanding interest of $13,138.29. Bender contacted the FDIC to determine whether it was in fact prepared to compromise its debt as Bishay had represented. In an effort to protect Citizens' secured interest in Bishay's assets, Bender inquired as to whether the FDIC would allow Citizens to purchase the FDIC loan. The FDIC responded that it would sell the loan only if Bishay failed to pay the price agreed. Thereafter, on June 29, 1994, Bishay wrote to Citizens, alluding to inappropriate misconduct that Citizens had committed that could lead to liability. Further, in a letter dated July 14, 1994, counsel for Bishay asserted that Bender's communications with the FDIC constituted an unfair and deceptive trade practice in violation of General Laws Chapter 93A.

A week later, on July 20, 1994, Bishay again wrote to Citizens, requesting that the bank grant him an additional forbearance period and agree to subordinate its secured mortgage on the 1095 Commonwealth Avenue property to a two million dollar loan to be given by Framingham Savings Bank for the purpose of obtaining a release of the FDIC mortgage for $1.2 million and renovating the property. Citizens refused to subordinate its mortgage on the property unless Bishay agreed to a variety of terms acceptable to the bank, including a general release of any and all claims Bishay might have against Citizens.

Thus, on September 16, 1994, Citizens entered into a Forbearance Agreement with Bishay; Old Post Trust; Commonwealth Trust; the U.S. Auto Exchange Group, Ltd. (Auto Exchange), an entity which operates the automobile business at Bishay's Commonwealth Avenue property; and the 1095 Commonwealth Avenue Corporation, an entity which acquired property from the Commonwealth Trust. Under this Forbearance Agreement, Citizens withdrew its demand and extended the maturity date of the Note until July 31, 1995, at which time the entire remaining balance of the Note would become absolutely due and payable without notice. Citizens also agreed to subordinate its second mortgage position on 1095 Commonwealth Avenue to Framingham Savings Bank, enabling Bishay to finance and discharge the debt owed to the FDIC.

In exchange, Bishay agreed to pay down the outstanding principal by an amount of not less than one million dollars on or before January 31, 1995, to pay a $10,000 forbearance fee, and to pay the $5,314.85 in legal fees Citizens had incurred in connection with the Note, as well as any legal fees and expenses incurred by Citizens from July 1, 1994 forward. Further, Bishay agreed to pledge additional collateral to secure the Note, including among other things, an unlimited guaranty from Massachusetts Auto Group, Ltd. d/b/a Bishay Isuzu, the Auto Exchange, and the Commonwealth Avenue Corp. dated September 16, 1994 (the 1994 Guaranty). In

addition, Bishay Motors pledged as collateral fifteen antique automobiles. The Forbearance Agreement further provided that:

> upon the happening of an event of default under any of the documents securing the Note, including, but not limited to, (a) failure to pay when due any installment of principal or interest which failure continues for fifteen (15) days after receipt of monthly bill or (b) upon the failure to observe or perform any of the agreements contained in this letter which failure continues for five (5) days after written notice from Citizens, all amounts outstanding under the Note and this letter shall be immediately due and payable in full ...
>
> You hereby waive, release and forever discharge Citizens and Neworld Bank, and each of their employees, officers, directors, and agents (collectively the "Banks") from any and all claims, suits, actions or liabilities of any kind which you, Bishay Motors, or any entity controlled by you have arising out of relating to your or their relationships with the Banks arising prior to the date hereof including, without limitation, any allegation that Citizens dealt improperly with respect to the Commonwealth Avenue property.

Bishay failed to make the monthly debt service payments under the Note and further failed to pay the one million dollars as required by the Forbearance Agreement. On February 8, 1995, Citizens amended the Forbearance Agreement to reduce the attorneys fees owed to $25,000 and extend the $1,000,0000 principal payment obligation to April 30, 1995 in exchange for an extension fee of $5,000 and payment of $75,000 from the sale of Bishay's Beacon Street property. In March of 1995, Bishay sold 14 residential lots in Walpole and used the proceeds to pay $759,358.45 to Citizens in partial compliance of his principal pay down

obligation. However, he made no further payments. On April 20, 1995, Citizens requested that Bishay liquidate or refinance certain of his assets and use the proceeds to pay down his debt, but Bishay refused. The following week, Citizens demanded that he turn over possession of the antique automobiles for sale by Citizens. Bishay refused to turn over the automobiles, inform Citizens of the location of the automobiles, or voluntarily sell the automobiles himself. Thereafter, by certified letter dated May 3, 1995, Citizens accelerated the Note and made demand on Bishay and all other guarantors for immediate payment of all sums due under the Note and related agreements. However, Bishay failed to repay the loan and refused several offers by Citizens to forbear legal action in exchange for Bishay's voluntary liquidation of various collateral to pay down the loan and execution of a general release with respect to any and all claims against Citizens.

Accordingly, on June 9, 1995, Citizens commenced this action alleging in Counts I and II that Bishay breached the Note and Credit Agreement and the Forbearance Agreement; alleging in Counts III, IV and V that Bishay Motors, Old Post Trust and Commonwealth Trust breached their respective Guaranties; alleging in Count VI that Bishay Motors breached the Forbearance Agreement; and alleging in Count VII that Auto Exchange, Bishay Isuzu and Commonwealth Ave. Corp. breached the 1994 Guaranty. Citizens' complaint sought all amounts due under the Note and Credit Agreement, including attorneys fees and all other costs of collection. In response, Bishay filed two counterclaims against Citizens alleging breach of the obligation of good faith and fair dealing and a violation of General Laws Chapter 93A.

Shortly thereafter, on July 25, 1995, Commonwealth Ave. Corp. filed a voluntary Chapter 11 petition in the Bankruptcy Court[3] and on September 19th, Bishay

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[3] U.S. Bankruptcy Docket # 95-15015-CJK.

individually filed a voluntary Chapter 11 petition.[4] On April 23, 1996, following a two-day hearing, the Bankruptcy Court (Kenner, J.) issued a Confirmation Order in both bankruptcies over Bishay's objections confirming a Chapter 11 plan of reorganization proposed by Citizens. The plan required Bishay to pay in full Citizens' claim for principal in the amount of $1,582,315.11 and accrued pre-petition interest of $26,795.21 on or before December 27, 1996, plus any post-petition interest, attorneys' fees and collection charges as the court may allow.

Under the Note and related agreements, Citizens was entitled to its costs of collection, including attorneys' fees. However, a dispute arose between Citizens and Bishay over the nature of the billing arrangement between Citizens and its counsel, Brown, Rudnick, Freed & Gesmer (BRFG). Citizens had repeatedly represented to the Bankruptcy Court that BRFG billed its regular hourly rates for the enforcement and collection of Bishay's loan. During the course of the bankruptcy proceedings, however, Bishay discovered that Citizens had failed to disclose a billing arrangement whereby BRFG would charge Citizens a blended hourly rate unless the debtor at issue had the assets to pay the fees, in which case BRFG would charge its higher standard hourly rate.

On July 10, 1996, the Bankruptcy Court (Kenner, J.) held a hearing on Citizens' fee application. The Court found that Citizens had misrepresented the billing agreement between itself and BRFG and that one Citizens' officer, Steven Mastrovich, had intentionally deceived the Court as to the agreement. Citizens voluntarily agreed to reduce the fees sought to charge the lower blended rate, and to further reduce the award to account for duplicative entries in the billing records, resulting in a $21,692.50 reduction in the fees sought. Accordingly, the Court awarded Citizens $204,936.01 in fees and expenses and $11,175 for appraisal

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[4] U.S. Bankruptcy Docket # 95-16331.

expenses. In addition, the Court entered a sanction against Citizens in the amount of the reasonable attorneys fees incurred by Bishay in litigating the blended-rate agreement issue, and denied Citizens future reimbursement for the time spent in conjunction with applying for fees and costs under the Note.

In the present Superior Court action, Citizens filed a motion to dismiss Bishay's two-count counterclaim in June of 1996, while the bankruptcy case was still pending, and in response, Bishay sought leave to file an amended answer and counterclaim. On November 8, 1996, this Court (White, J.) allowed Bishay to amend his counterclaim and denied Citizens' motion for summary judgment without prejudice to renew it as to the amended answer and counterclaim. Count I of Bishay's amended counterclaim alleges breach of good faith and fair dealing, Count II alleges promissory estoppel, and Count III alleges intentional interference with contractual and advantageous relations. Count IV seeks declaratory relief with respect to the validity of the Forbearance Agreement. Finally, Count V alleges intentional infliction of emotional distress and Count VI alleges numerous violations of General Laws Chapter 93A.

Citizens now moves for partial summary judgment on all of Bishay's amended counterclaims on the ground that said claims are barred by the doctrine of res judicata and in any event, fail to state claims upon which relief can be granted. Bishay has filed a cross-motion for partial summary judgment on his counterclaims and alternatively, to eliminate the bond requirement for any attorneys fees which may be incurred by Citizens in defending against said counterclaims.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553, 340 N.E.2d 877 (1976); *Cassesso v. Commissioner of Correction*, 390 Mass.

419, 422, 456 N.E.2d 1123 (1983); Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17, 532 N.E.2d 1211 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716, 575 N.E.2d 734 (1991); *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809, 575 N.E.2d 1107 (1991).

I. CITIZENS' MOTION FOR SUMMARY JUDGMENT

A. *Res Judicata*

Citizens contends that Bishay's counterclaims allege either defenses to repayment of the Note or wrongful conduct by the bank in connection with negotiating and enforcing the Note and as such, are precluded by the April 23, 1996 Confirmation Order of the Bankruptcy Court, which allowed Citizens' claim for repayment of the Note in full. It is well established that the normal rules of res judicata and collateral estoppel apply to the decisions of the bankruptcy courts. *Katchen v. Landy*, 382 U.S. 323, 324 (1966); *F.D.I.C. v. Shearson-American Exp., Inc.*, 996 F.2d 493, 497 (1st Cir. 1993), *cert. den.*, 510 U.S. 1111 (1994). Final orders of the bankruptcy court are res judicata as to all matters that were or could have been litigated before the bankruptcy court.[5] *Chicot*

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[5] The res judicata effect of an order of a bankruptcy court, a federal tribunal, is governed by federal preclusion principles. *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 978 (1st Cir.1995). However, Massachusetts and the federal courts apply the same tests for res judicata and collateral estoppel.

County Drainage District v. Baxter State Bank, 308 U.S. 371, 377 (1940); *A. Musto Co., Inc. v. Satran*, 477 F. Supp. 1172, 1176-1177 (D. Mass. 1979) (holding that plaintiff's action for damages against former trustee in bankruptcy for breach of fiduciary duty was barred by prior proceedings in the bankruptcy court dismissing with prejudice the debtor's petition for removal of the trustee). See also *O'Donoghue v. Manning*, 331 Mass. 23, 24, 116 N.E.2d 693 (1954) (holding that a suit in equity to establish plaintiff's title to land based on a deed from the trustee in bankruptcy of a former owner was barred by the determination of the bankruptcy court in a prior proceeding that the trustee had no title).

The application of res judicata to a bankruptcy court order confirming a Chapter 11 reorganization plan generally bars later proceedings on all claims and issues concerning the debtor-creditor relationship that were actually raised during the confirmation process as well as those that could have been raised during said process, thus supporting the strong policy of finality in bankruptcy reorganization. *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938); *Matter of Baudoin*, 981 F.2d 736, 739 (5th Cir. 1993); *In re DiBerto*, 171 B.R. 461, 471-472 (Bankr. N.H. 1994).

Nonetheless, Bishay relies on explicit language in the reorganization plan in arguing that the Bankruptcy Court's April 23, 1996 Confirmation Order does not preclude his counterclaims in the present action. The reorganization plan provides in relevant part:

> The Class One Claim[6] is impaired ... The Debtors' estates may retain and, by its duly authorized representative(s) settle, release or prosecute, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the "Alleged Claims"). However, the

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[6] Pursuant to Article III of the plan, "*Class One*, consist[s] of the secured claim of Citizens Bank of Massachusetts."

> Alleged Claims, until and unless reduced by Final Order to a judgment against Citizens, shall not reduce, delay or otherwise interfere with the timely and full satisfaction of Citizens' Class One Claim in accordance with this Plan. In addition, until Citizens actually receives ... a release from (and evidence of dismissal with prejudice of) all Alleged Claims, Citizens shall retain its lien on all Estate Assets not disposed of in accordance with this Plan as security for Citizens' contractual right to reimbursement from the Debtors for Citizens' costs and anticipated costs of defending the Alleged Claim.

Under a generally accepted exception to the res judicata doctrine, a party's claims are not precluded by a prior action if the court in that action expressly reserves those claims for later adjudication. *Apparel Art Intern. v. Amertex Enterprises*, 48 F.3d 576, 586 (1st Cir. 1995); *D & K Properties Crystal Lake v. Mutual Life Ins.*, 112 F.3d 257, 260 (7th Cir. 1997). Thus, a bankruptcy court order confirming a reorganization plan will not bar the debtor from asserting a cause of action against the creditor where the confirmed plan expressly reserves the debtor's right to litigate post-confirmation claims. *D & K Properties Crystal Lake v. Mutual Life Ins.*, *supra* at 261; *In re Kelly*, 199 B.R. 698, 703 (9th Cir. BAP 1996). See also *In re DiBerto*, *supra* at 474-475. However, any reservation of a debtor's right to pursue rights and remedies outside of the bankruptcy proceeding must specifically identify the cause of action reserved. "[A] blanket reservation that seeks to reserve all causes of action reserves nothing. To hold otherwise would eviscerate the finality of a bankruptcy plan containing such a reservation, a result at odds with the very purpose of a confirmed bankruptcy plan." *D & K Properties Crystal Lake v. Mutual Life Ins.*, *supra* at 261.

Thus, language in a confirmation plan that the disbursing agent "shall enforce all causes of action existing in favor of the Debtor" was insufficient to reserve the debtor's claim that

a creditor breached its financing contract by raising the interest rate in bad faith. *Id.* Similarly, language in a confirmed plan which stated "Within thirty days of the Plan Confirmation, the Debtor shall initiate adversary proceedings to contest the amount, allowability, priority and/or secured status of any claims which the Debtor believe are not proper. The Debtors may at the same time bring any counter-claims that they believe proper against any creditors asserting claims" failed to reserve the debtor's counterclaims for improper modification of the underlying obligation and improper disposal of collateral. *In re Kelly*, *supra* at 703-704. Compare *In re Hooker Investments, Inc.*, 162 B.R. 426, 432-434 (Bankr. S.D.N.Y. 1993) (holding that res judicata did not bar post- confirmation litigation where confirmed plan expressly stated that creditors had right to assert, settle, compromise or abandon those claims or causes of action listed on "schedule 9 hereto" and schedule identified specific causes of action, both pending and contemplated, against particular parties).

At the time the Bankruptcy Court confirmed the reorganization plan in the present case, Bishay's counterclaim against Citizens in this Superior Court action asserted only two claims. Count I alleged that Citizens breached its duty of good faith and fair dealing by refusing to subordinate its mortgage on the 1095 Commonwealth Ave. property to a new mortgage loan by Framingham Savings Bank until Bishay agreed to certain terms, including a release of all claims against the bank. Count II further alleged that Citizens' conduct with respect to the subordination of its mortgage constituted an unfair trade practice in violation of Chapter 93A. These two claims, which are restated as Counts III and VI of Bishay's amended counterclaim, do not go to the validity of the loan obligation owed to Citizens but rather, constitute independent claims which could be characterized as a set-off to Bishay's debt. Citizens thus concedes that the

Bankruptcy Court intended these two claims to survive the final confirmation order.[7]

Citizens argues, however, that the language permitting Bishay and 1095 Commonwealth Ave. Corp. to assert "their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters" constitutes a blanket reservation insufficient to preserve the remaining four counts of the amended counterclaim for post-confirmation adjudication. This argument is amply supported by the relevant case law, which requires express and specific identification of the individual causes of action reserved. See *D & K Properties Crystal Lake v. Mutual Life Ins.*, *supra* at 261; *In re Kelly*, *supra* at 703-704. The language of the reservation in the reorganization plan is far too broad and vague to prevent the Confirmation Order from constituting res judicata as to all claims other than the two specific claims pending in Superior Court at the time of the Order.

Moreover, this result is supported by the strong policy of finality inherent in the bankruptcy reorganization process. In contrast to Bishay's original two counterclaims, the additional counts are in the nature of defenses to Bishay's obligation to repay the debt owing to Citizens. Count I of the amended counterclaim asserts that Citizens committed numerous breaches of its express and implied duties under the Note and Forbearance Agreement; Count II asserts that Citizens is estopped from treating the Note as a demand obligation and collecting the full amount; and Count IV seeks a declaratory judgment that the Note and Forbearance Agreement are extortionate in violation of public policy and are thus null and

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[7] This result is confirmed by the fact that on September 4, 1996, the Bankruptcy Court (Kenner, J.) allowed a joint motion by Bishay and the Consummation Agent to appoint Bishay as the representative of the debtors' estates and to authorize him to employ the firm Brown & Stadfeld as special counsel to pursue the present litigation, Norfolk Superior Court Action No. 95-1312A.

void, as well as an order requiring Citizens to disgorge all payments made thereunder. These claims in essence seek to litigate the validity of the Note and Forbearance Agreement. However, in allowing Citizens' claim in full and ordering Bishay and 1095 Commonwealth Ave. Corp. to repay the obligation incurred pursuant to the Note and related instruments, the Bankruptcy Court necessarily determined that these agreements were valid and enforceable. The issues which Bishay seeks to raise in Counts I, II, IV and V of the amended counterclaim were essential to the final and binding judgment entered in the bankruptcy proceeding, and to interpret the plan's reservation as encompassing such claims would eviscerate the finality of the confirmed plan.

Finally, although Count V of the amended counterclaim alleges an independent claim in the nature of a set-off, that Citizens intentionally inflicted emotional distress on Bishay with respect to the entire loan transaction, such a claim is now barred by the final Confirmation Order because the reorganization plan's express reservation fails to specifically identify an emotional distress claim as reserved for post-confirmation litigation. Hence, this Court concludes that the Bankruptcy Court's April 23, 1996 Confirmation Order constitutes res judicata as to Counts I, II, IV and V of Bishay's amended counterclaim, precluding relitigation of the claims and issues therein. Accordingly, Citizens is entitled to judgment as a matter of law on those Counts. However, this Court further concludes that the Bankruptcy Court Order expressly reserves Counts III and VI for post-confirmation adjudication in the present Superior Court action.

B. *General Release*

Citizens next contends that Count III and most of Count VI of the amended counterclaim are nonetheless barred by the general release contained in the parties' September 16, 1994 Forbearance Agreement. Paragraph 14 of the Agreement provides:

> *Lender Liability.* You hereby waive, release and forever discharge Citizens and Neworld Bank, and each of their employees, officers, directors, and agents (collectively the "Banks") from any and all claims, suits, actions or liabilities of any kind which you, Bishay Motors, or any entity controlled by you have arising out of relating to your or their relationships with the Banks arising prior to the date hereof including, without limitation, any allegation that Citizens dealt improperly with respect to the Commonwealth Avenue property.

Citizens contends that this release serves as a defense not only to Count III, which alleges that Citizens interfered with Bishay's relations with the FDIC and other entities concerning the 1095 Commonwealth Ave. property, but also to all allegations in Count VI concerning events occurring prior to September 16, 1994.[8] Bishay argues, however, that the entire Forbearance Agreement, including the release, is not binding on him because he signed it under economic duress.

To avoid a contract on the basis of economic duress, a party must show that he has been the victim of a wrongful or unlawful act or threat, which has deprived him of his unfettered will, compelling him to make a disproportionate exchange of values. *International Underwater Contractors, Inc. v. New England Tel. & Tel. Co.*, 8 Mass. App. Ct. 340, 342, 393 N.E.2d 968 (1979); *Delaney v. Chief of Police of Wareham*, 27 Mass. App. Ct. 398, 406, 539 N.E.2d 65, *rev. den.*, 405 Mass. 1204, 542 N.E.2d 602 (1989). Alternatively, a party may establish economic duress by showing that he involuntarily accepted the terms of the other party, under circumstances which permitted no other alternative, and that

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[8] This would include subsections a, b, c, d, e, g, h and i of Count IV. Subsections f, j, k, l and m concern events occurring after 9/16/94.

said circumstances were the result of coercive acts by the other party. *International Underwater Contractors, Inc. v. New England Rel. & Tel. Co.*, *supra* at 342, 393 N.E.2d 968. It is well established that merely taking advantage of another's financial difficulty is not economic duress. Further, doing or threatening to do that which one has a legal right to do cannot form the basis of a claim of economic duress. *Id.*; *Delaney v. Chief of Police of Wareham*, *supra* at 407, 539 N.E.2d 65. Rather, the plaintiff must show that the defendant's wrongful and oppressive conduct created the plaintiff's financial difficulties, which the defendant then took advantage of. *International Underwater Contractors, Inc. v. New England Rel. & Tel. Co.*, *supra* at 342, 393 N.E.2d 968.

In the present case, Bishay contends that Citizens committed numerous wrongful acts which left him with no alternative but to agree to Citizens' demand that he make a disproportionate exchange of value in the September 16, 1994 Forbearance Agreement: the assignment of $18 million in additional collateral to secure an already oversecured loan of $2.4 million plus a general release of all claims against the bank in exchange for Citizens' withdrawal of its demand for full payment and subordination of its security position on the Commonwealth Ave. property. The coercive acts which Bishay alleges created his financial difficulties, leaving him no alternative but to sign the Forbearance Agreement, are Citizens' demand for repayment of the entire principal balance of the loan upon default, its failure to give Bishay a reasonable opportunity to cure, its oversecuring of the loan, and its interference with Bishay's dealings with the FDIC.

This Court concludes that Bishay has no reasonable expectation of proving his claim that he executed the September 16, 1994 Forbearance Agreement and general release under economic duress. The undisputed facts reveal that Bishay informed Citizens in April of 1994 that he was stopping his monthly principal payments because the expenses associated with the start-up of a new dealership had left him without available cash flow. Thus, the financial

difficulties leading to his default on the Note were of Bishay's own making rather than caused by Citizens' conduct. Once Bishay was in default, Citizens was entitled under the terms of the Note to accelerate the debt and demand full payment, and its actions in doing so cannot be deemed to be oppressive or wrongful. Merely taking advantage of another's financial difficulty and doing that which one has a legal right to do cannot form the basis of a claim of economic duress. *International Underwater Contractors, Inc. v. New England Rel. & Tel. Co.*, *supra* at 342, 393 N.E.2d 968; *Delaney v. Chief of Police of Wareham*, *supra* at 407, 539 N.E.2d 65.

Moreover, a release or other contract, the execution of which was induced by duress, is voidable, not void, and the party claiming duress must act promptly to repudiate the agreement or be deemed to have waived his right to do so. *Ismert & Associates v. New England Mut. Life Ins.*, 801 F.2d 536, 547-548 (1st Cir. 1986); *In re Boston Shipyard Corp.*, 886 F.2d 451, 455 (1st Cir. 1989); *Vasapolli v. Rostoff*, 39 F.3d 27, 35 n.5 (1st Cir. 1994). If the coerced party fails within a reasonable time to contest an agreement allegedly executed under duress, that agreement may be ratified and affirmed. *Id.* A party may ratify an agreement entered into under duress by intentionally accepting benefits under it; by acquiescing in it for a period of time after having the opportunity to avoid it; or by acting upon or performing under it. *In re Boston Shipyard Corp.*, *supra* at 455; See also *Delaney v. Chief of Police of Wareham*, *supra* at 408, 539 N.E.2d 65.

In the present case, Bishay failed to object to the September 16, 1994 Forbearance Agreement until some nine months after its execution, when Citizens finally initiated suit to collect on the Note. Bishay then for the first time raised economic duress as a defense to the Forbearance Agreement and the release contained therein. In the meantime, Bishay accepted the benefits of the agreement by utilizing the extension of time in which to pay back the loan, and by obtaining financing from Framingham Savings, which would

not have been possible if Citizens had not agreed to subordinate its mortgage on the Commonwealth Avenue property. Moreover, Bishay continued to perform under the Forbearance Agreement by making sporadic payment reductions on the loan. Thus, this Court concludes that even if Bishay were able to establish that the Forbearance Agreement was executed under economic duress, he nonetheless ratified the agreement through his subsequent conduct, thereby waiving his right to challenge the release on the grounds of duress. See *In re Boston Shipyard Corp.*, *supra* at 455 (holding that by accepting payments under contract and continuing to perform for several months until the other party terminated the contract, the plaintiff ratified the contract, waiving any claim of duress); *In re A.J. Lane & Co., Inc.*, 171 B.R. 1, 3 (D. Mass. 1994), *aff'd*, 50 F.3d 1 (1st Cir. 1995) (holding that a party ratified an agreement allegedly entered into under economic duress by continuing to perform under it).

Accordingly, the general release contained in the parties' Forbearance Agreement is valid and binding on Bishay, who is precluded from asserting any claim against Citizens arising from the parties' relationship prior to September 16, 1994. Citizens is thus entitled to judgment as a matter of law on Count III and Subsections a, b, c, d, e, g, h and i of Count VI of Bishay's amended counterclaim. The remainder of the claims in Count VI present genuine issues of material fact not appropriate for resolution at this time stage of the proceedings.

II. BISHAY'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Finally, Bishay moves this Court to enter partial summary judgment in his favor against any claim Citizens may have for attorneys' fees incurred in defending against Bishay's counterclaims, and to strike Citizens' lien on his property located at 75 Providence Highway in Walpole as

well as the alternative $500,000 surety company bond requirement. In the confirmed reorganization plan, the Bankruptcy Court allowed Bishay to proceed with his pending counterclaims in the present action but retained a $500,000 lien on Bishay's property in favor of Citizens as security for its contractual right to recover attorney's fees in the event that it successfully defended against Bishay's counterclaims. The reorganization plan provides in relevant part:

> the Debtors may obtain the discharge of such liens within thirty (30) days ... by delivering to Citizens (i) an irrevocable letter of credit (in form and substance reasonably acceptable by Citizens) issued for the benefit of Citizens by a reputable domestic commercial bank in the amount of $500,000 *subject to being drawn by Citizens by presentation of a sworn statement that a court of competent jurisdiction has determined that Citizens has the right to recover costs or expenses (including, without limitation, attorneys' fees or expenses) incurred in connection with defense of the Alleged Claims in an amount equal to or greater than the amount of such draw.* (emphasis added).

Bishay correctly notes that the Bankruptcy Court thus reserved to this Court the power to determine whether Citizens is entitled to recover attorneys fees for successfully defending against Bishay's counterclaims in the present matter. He then urges this Court to determine that Citizens is barred from recovering fees even if successful in defending against Bishay's counterclaims on the ground that Citizens' attempt to fraudulently collect attorney's fees under an undisclosed dual fee arrangement in the bankruptcy

proceeding[9] constitutes a wilful breach of the attorneys fees clause in the Note, precluding any further recovery under it.

Bishay's claim that Citizens' conduct precludes it from recovering under the contractual provision for attorney's fees is barred by the res judicata effect of both the Bankruptcy Court's April 23, 1996 Confirmation Order and its January 21, 1997 Order awarding attorney's fees pursuant to Chapter 11, section 506(b). The Confirmation Order established the $500,000 lien as security for Citizens' contractual right to recover attorneys fees in the present Superior Court action. Having failed to appeal the Bankruptcy Court's Confirmation Order, Bishay cannot now be permitted to collaterally attack it in the present summary judgment proceeding.

Further, during the July and October 1996 hearings on Citizens' contractual right to recover attorneys fees incurred in connection with the bankruptcy proceedings, Bishay repeatedly argued that Citizens' misconduct with respect to the dual billing arrangement precluded any recovery under the fee reimbursement provision of the Note on public policy grounds. Nonetheless, the Bankruptcy Court concluded that Citizens was entitled to recover reasonable fees under the Note, but only to the extent of the lower rate the bank would have been obligated to pay under the dual billing arrangement. The Bankruptcy Court further determined that the appropriate sanction for Citizens' misconduct was the reduction of its fee award and the payment of the legal fees incurred by Bishay in the fee dispute hearings. Implicit in and necessary to the Bankruptcy Court's decision was a determination that Citizens' misconduct did not preclude its recovery under the Note's provision for attorneys fees. The Bankruptcy Court's January 21, 1997 Memorandum and Order thus constitutes res judicata as to the enforceability of the Note's fee provision, and Bishay is barred from re-

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[9] See pages 11-12 of this decision, *supra,* for a discussion of the Bankruptcy Court proceedings with respect to attorneys fees.

litigating that issue here by attempting to cast it as a breach of contract claim. Citizens' misconduct with respect to the dual billing arrangement thus does not constitute a valid ground for denying Citizens attorneys fees incurred in connection with defending Bishay's counterclaims in the present action. Accordingly, Bishay is not entitled to partial summary judgment sought.

ORDER

For the foregoing reasons, it is hereby *ORDERED* that Citizens' motion for summary judgment be *ALLOWED* as to Counts I, II, III, IV and V of the amended counterclaim. It is further *ORDERED* that Citizens' motion for summary judgment be *ALLOWED* as to Subsections a, b, c, d, e, g, h and i of Count VI but *DENIED* as to Subsections f, j, k, l and m of Count VI.

Finally, it is hereby *ORDERED* that the defendants' motion for partial summary judgment be *DENIED.*

CITIZENS BANK OF MASSACHUSETTS,

v.

BAHIG BISHAY

782 N.E.2d 515

SUPREME JUDICIAL COURT OF MASSACHUSETTS

OPINION:

Further appellate review denied.

Supreme Court, U.S.
FILED
MAY 9 2003
OFFICE OF THE CLERK

No. 02-1479

IN THE

Supreme Court of the United States

BAHIG BISHAY,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether, assuming this Court has jurisdiction in light of the separate, adequate and independent state grounds supporting the dismissal, the Massachusetts Appeals Court's determination that the confirmation order was res judicata as to the Petitioner's counterclaims against Respondent was correct where the court's decision was based on the facts that:

(a) the plan of reorganization contained general language in the reservation clause;

(b) the Petitioner had ample opportunity to contest the plan or seek its modification; and

(c) statements made by counsel at the confirmation hearing were contradictory.

RULE 29.6 STATEMENT

The parent corporation of Respondent, Citizens Bank of Massachusetts, is Citizens Financial Group, Inc. No publicly held company owns 10% or more of the stock of Respondent.

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OPINIONS BELOW

The reproduction of the decision of the Massachusetts Appeals Court ("Appeals Court") in the Appendix to the Petition is missing the first two footnotes and misstates the correct caption of the case in that court; a correct copy is included in the Respondent's Appendix. (R. App. 1a-12a)[1] Moreover, in addition to the one decision of the Massachusetts Superior Court ("Superior Court") at Petitioner's Appendix 11a-34a, that court issued three subsequent decisions that are relevant to this appeal. Those opinions are unpublished, but are included, in chronological order, in the Respondent's Appendix. (R. App. 13a-54a)

STATEMENT OF THE CASE

The backdrop to this Petition is that the Petitioner, Bahig Bishay ("Bishay"), was a car dealer who entered into a $2.5 million demand loan in 1988 with a local Massachusetts bank that merged into Respondent, Citizens Bank of Massachusetts ("Citizens"), in 1994. Unable to repay the loan when called in 1989, Bishay sought and received multiple extensions of time to repay until he simply announced he would no longer pay in accordance with the terms of the then-operative forbearance agreement. When Citizens called the loan again for this default, Bishay threatened and remonstrated, but ultimately entered into another forbearance agreement that included a general release of all claims, real or imaged. Then Bishay defaulted again and Citizens commenced the inevitable collection proceedings. Bishay thereafter filed a limited two-count counterclaim based on alleged impropriety in Citizens' initial collection activities after it first declared a default. He asserted these claims despite the fact that he had signed a

1. The Petitioner's Appendix will be cited as (P. App.); the Respondent's as (R. App.).

general release covering the time period in question. Cognizant of this, he also alleged economic duress. In any event, almost immediately after this filing, Bishay sought cover in the Bankruptcy Court.[2] Six months later, the Bankruptcy Court removed Bishay as debtor-in-possession and appointed a Trustee due to his failure to put forth an acceptable plan of reorganization.[3] Thereafter, an amended plan of reorganization, first put forward by Citizens, was approved by the Bankruptcy Court. The plan provided that Citizens' secured claim was "allowed" (that is, it was a valid obligation) and established a date for repayment. The plan also included a general reservation clause reserving the claims Bishay had against Citizens which, at the time, appeared in the form of the previously filed two-count counterclaim.

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2. Bishay actually caused two Chapter 11 bankruptcy petitions to be filed; one on behalf of himself, the other on behalf of 1095 Commonwealth Ave. Corp. ("1095 Comm. Ave."), a company he wholly owned. Those cases were consolidated. 1095 Comm. Ave. was also an original defendant and plaintiff-in-counterclaim, as were five other Bishay controlled entities. Only Bishay, individually, has filed this Petition.

3. This was but the first incidence of the Bankruptcy Court realizing that Bishay had filed for bankruptcy merely as a delay tactic, as opposed to out of necessity. Ultimately, in a forty-one page decision that addressed much of the post-bankruptcy filing conduct that Bishay later argued resulted in Citizens' liability to him, the Bankruptcy Court expressly found that Bishay was unjustifiably obstreperous and evasive throughout the proceedings in the face of an obviously owed obligation, such that Citizens was justified in increasingly aggressive collection activities. The court ordered Bishay to pay Citizens over $200,000 in legal fees incurred during the bankruptcy proceedings alone. *See In re 1095 Comm. Ave. Corp.*, 204 B.R. 284 (Bankr. D. Mass. 1997), *aff'd*, 236 B.R. 530 (D. Mass. 1999). That the bankruptcy filing was a tactical gambit employed by Bishay is punctuated by the fact that his later-filed claims against Citizens were based in part on the assertion that the value of his assets, over which Citizens held liens, exceeded his debt to Citizens by nearly nine times.

Of course, all parties had the opportunity to review, comment and argue before the court the provisions of the proposed plan prior to confirmation.

Following the April 1996 confirmation hearing, approval of the plan by the court and expiration of the applicable appeal period, Bishay sought leave in the Superior Court to file an amended counterclaim that raised new and radically different claims based on conduct that both pre-dated the claims alleged in the original counterclaim, and that occurred during the bankruptcy proceeding itself. After one Superior Court judge allowed the amended counterclaim to be filed, a second issued a series of decisions dismissing on summary judgment each and every claim.[4] One of the bases for dismissal of certain claims was the res judicata effect of the confirmed plan of reorganization. It is this determination, affirmed in all respects by the Appeals Court, and the rejection of Bishay's argument that the reservation clause contained in this confirmed plan adequately preserved his later amended claims, that galvanizes this Petition.

Bishay makes a two-prong argument to entice this Court to exercise its rarely used discretion to grant certiorari, neither of which are compelling. First, Bishay says that the Appeals Court was simply wrong in its interpretation of the reservation clause. Such arguments rarely, if ever, justify the exercise of this Court's jurisdiction. Second, Bishay asserts that there is an intractable split amongst the myriad state and federal courts regarding the appropriate application of 11 U.S.C. § 1123(b)(3), and that efficient and effective administration of the bankruptcy process requires this Court's intervention. Contrary to Bishay's assertion, there is no significant split amongst the lower courts. Moreover, the overwhelming

4. Following the last of these orders, the Superior Court awarded Citizens over $360,000 in attorneys' fees and costs. (R. App. 40a-54a)

majority of courts addressing the issue have ruled consistently with the Appeals Court. The few cases that Bishay cited as articulating a different standard are either distinguishable on their facts or simply dicta.

In any event, what Bishay overlooks is that this Court lacks jurisdiction because the dismissal of Bishay's claims is, from the face of the Appeals Court's decision and the unappealed portions of the Superior Court's decisions, supported on separate, adequate and independent state law grounds. Accordingly, the Petition must be denied.

STATEMENT OF FACTS[5]

On June 8, 1988, Neworld Bank, Citizens' predecessor-in-interest, and Bishay entered into a Revolving Credit Agreement, Demand Note and Personal Guarantee (collectively, the "Loan Documents") in the amount of $2,560,000. (P. App. 12a) The Demand Note contained Bishay's unconditional promise to repay on demand. (*Id.*) The Revolving Credit Agreement reiterated the fact that the obligation was payable on demand, but in no event was to be repaid later than June 8, 1989. (P. App. 13a) Bishay did not repay the loan in 1989. Instead, between June 1989 and August 1993, the date for repayment of the debt was extended seven times – the first three times in the form of extension agreements; the last four as forbearance agreements. (P. App. 14a-15a) The last of these extensions, agreed to in August 1993, set a new maturity date of June 30, 1994. (P. App. 15a) This extension also required Bishay to make monthly principal payments of $7,500, plus accrued interest. (*Id.*) On

5. The majority of the facts set forth herein are restated in either the Appeals Court's or the Superior Court's decisions. Those that are not are taken from the 12 volume record appendix that accompanied the appeal before the Appeals Court. *See* Sup. Ct. R. 12.7.

April 14, 1994, Neworld merged into Citizens. (P. App. 16a) On April 18, 1994, Bishay wrote to Neworld and informed it that he was ceasing monthly principal payments due to cash flow problems caused by large expenses incurred in the start up of a new Isuzu automobile dealership. (P. App. 15a) On May 9, 1994, Citizens sent a written default letter to Bishay. (P. App. 16a) Following Bishay's continuing payment default in May 1994, Citizens accelerated the debt by letter dated June 15, 1994. (*Id.*) The August 1993 forbearance agreement otherwise would have matured by its terms two weeks later on June 30, 1994.

Over the next 2½ months, Citizens and Bishay negotiated yet another forbearance agreement, which was ultimately executed on September 16, 1994 (the "September 1994 Agreement"). (P. App. 17a) During this 2½ month period, Bishay was also in negotiations with the Federal Deposit Insurance Corporation (the "FDIC") to work out an unrelated default of a loan that was secured by one of Bishay's properties (1095 Comm. Ave.), which happened to also constitute additional security for the Citizens loan.[6] While negotiating with Bishay, Citizens contacted the FDIC to determine whether it might purchase the FDIC loan so that Citizens would obtain a first lien position on that property to further secure its loan. Nothing came of these discussions (P. App. 16a); however, because they occurred, Bishay leveled repeated allegations of wrongdoing against Citizens during this negotiations period. (*Id.*) Ultimately, a new forbearance agreement was agreed to in the form of the September 1994 Agreement. The September 1994 Agreement provided that: (1) the maturity date was extended to July 31, 1995; (2) Bishay was obligated to make a $1 million partial principal payment on or before January 31, 1995; and (3) Bishay (and any related entities)

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6. Citizens held a second mortgage behind the FDIC.

released all possible claims against Citizens and Neworld. (P. App. 17a-18a)

Bishay failed to make the required $1 million partial principal payment in January 1995. (P. App. 18a) On February 10, 1995, Citizens again executed an extension agreement extending the $1 million payment obligation until April 30, 1995. (*Id.*) On or about March 24, 1995, Bishay made a partial payment of approximately $750,000 towards this $1 million interim obligation. (P. App. 18a-19a) Bishay made no further payments prior to April 30, 1995, and, on May 4, 1995, Citizens again accelerated the obligation. (P. App. 19a) Citizens commenced this action in the Superior Court in June 1995 to recover the balance of the outstanding debt, plus continually accruing interest and costs of collection. (*Id.*)

Bishay filed an answer and counterclaim asserting two counterclaims based solely on Citizens' conduct in the "summer and fall of 1994" that allegedly constituted a breach of the implied covenant of good faith and fair dealing and a violation of Massachusetts General Laws, chapter 93A ("c. 93A"). (*Id.*) Soon thereafter, both Bishay's and 1095 Comm. Ave.'s bankruptcy petitions were filed by Bishay. (P. App. 19a-20a) On November 1, 1995, Bishay and 1095 Comm. Ave. filed a Joint Disclosure Statement (the "Debtors' Disclosure Statement") and Proposed Plan of Reorganization. The Bankruptcy Court refused to approve the Debtors' Disclosure Statement (and, as a result of the preclusion from soliciting creditors' votes, the Proposed Plan of Reorganization), ruling, on December 13, 1995, that it failed to contain adequate information. On December 27, 1995, the Bankruptcy Court appointed a Trustee for Bishay's bankruptcy estate, supplanting Bishay as debtor-in-possession.

In early November 1995, Bishay's counsel made a single inquiry of Citizens' counsel concerning the hypothetical terms of a payoff of Citizens' loan. (R. App. 8a and n.11) Citizens responded that the terms would include payment in full plus a general release of all claims, real or imagined. (*Id.*) Bishay never pursued the issue further; never tendered any money whatsoever; and, indeed, never produced a commitment letter from any new financing source. (*Id.*)

On April 23, 1996, following a two-day evidentiary hearing, the Bankruptcy Court issued an order (the "Confirmation Order") confirming the Chapter 11 plan first proposed by Citizens, as amended by the First and Second Modifications to Chapter 11 Plan (collectively, the "Plan"). (P. App. 20a) The Plan provides, in relevant part, that Citizens' claim is "allowed" in its entirety, and that Bishay's and 1095 Comm. Ave.'s estates "may retain . . . settle, release or prosecute their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the "Alleged Claims")." (P. App. 23a-24a) The only claims that were alleged at the time of confirmation were the two counts in Bishay's pending counterclaim. (P. App. 25a) The Plan also provided for a continuing $500,000 lien on Bishay's assets to secure Citizens' contractual right, under the Loan Documents, to be reimbursed for fees and costs that it might incur in defending itself against Bishay's counterclaims. (P. App. 32a) The amount of the lien was established following an open court colloquy between the judge and counsel in which Citizens' lawyers asserted that Bishay was an excessively litigious individual who had the propensity to litigate out of proportion to the merits of the case. Litigation between Bishay and an unrelated party was highlighted to support this assertion. In response, Bishay's counsel stated that the then-pending two-count counterclaim was discrete and limited and thus only a small lien should be

allowed.[7] Finally, the Plan identified Citizens' claim as "impaired" because repayment of the defaulted loan was not

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7. The colloquy between the Judge and Bishay's counsel (Mr. Murphy) was as follows:

> THE COURT: . . . I want to hear you on why you think $500,000 is excessive. And as I recall what Mr. Baldiga's argument was on Thursday was — and Mr. Baldiga can correct me if I am wrong — but basically he was saying, "Mr. Bishay is litigious." . . . I mean that was what I understood his argument was for the $500,000, but I am willing to hear your argument as to whether it should be some different number.
>
> MR. MURPHY: Oh. I think it should be. I think equating the — what I understand to be the extraordinarily complicated facts and circumstances surrounding the *Chambers* litigation is far different from what I've read a counterclaim that was asserted pre-petition against the Bank in that — in the Norfolk Superior Court which basically said that the bank was engaging in unfair deceptive practices. The bank had coerced him into executing a forbearance agreement, and I think there was one other allegation in the complaint.
>
> * * *
>
> MR. MURPHY: . . . a discrete counterclaim . . .
>
> * * *
>
> THE COURT: . . . I certainly can look at the answer and counterclaim and make some determinations as to how involved the litigation is. . . .
>
> * * *
>
> THE COURT: . . . I also have looked at the defendants' answer and counterclaim. Is there any testimony you want to put on or offer of proof that you want to make,

(Cont'd)

immediate; rather, repayment would not occur until the ensuing December.[8] Bishay never appealed the Confirmation Order.

Two months after confirmation, in June 1996, Citizens served its first summary judgment motion in the Superior Court seeking dismissal of the two-count counterclaim. (P. App. 21a) In August, Bishay sought leave to file an

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(Cont'd)

> Mr. Murphy, with respect to supporting your $250,000 set-aside?
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> * * *
>
> MR. MURPHY: I have nothing further to add. . . .
>
> * * *
>
> THE COURT: . . . I find that $500,000 is fair for the following reasons: based on the offer of proof that — with respect to what the cost of the *Chambers* litigation to date has been, based on my own experience litigating lender liability actions in this Court, and based on the — my reading of the defendants' answer and counterclaim and jury claim in the Norfolk Superior Court action as well as the Affidavit of Mr. Bishay, it seems reasonable for me to conclude that Citizens accepting $500,000 — a $500,000 lien on the assets of 75 Providence Highway is fair.

8. Bishay repeatedly confuses the meaning of an impaired claim under the Bankruptcy Code. A claim is impaired when it is paid in a manner different than that required by the contract creating the obligation in the first instance. Where a debt is due and owing as of the date of the filing of the petition for bankruptcy, a plan that proposes anything other than immediate and total payment renders a claim impaired. *See* 11 U.S.C. § 1124; *In re Tri-Growth Centre City, Ltd.*, 136 B.R. 848, 852 (Bankr. S.D. Cal. 1992) (claim is impaired where proposed plan did not pay defaulted loan as of date of plan).

amended counterclaim.[9] The Superior Court allowed Bishay's motion to amend and denied Citizens' motion for summary judgment, "without prejudice to being renewed as to the amended answer and counterclaim. . . ." (*Id.*)

The new claims asserted by Bishay were not identified in his bankruptcy schedules nor in the Disclosure Statement the Bankruptcy Court otherwise found deficient. Bishay never initiated an adversary proceeding against Citizens alleging these claims prior to confirmation. While Bishay had written a rambling letter to Citizens' Chairman, Lawrence K. Fish, in mid-October 1995 expressing his general dissatisfaction with the entire history of his banking relationship with Citizens up to that point in time,[10] he never followed up on

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9. The amended counterclaim alleged the following six counts: Count I (breach of good faith and fair dealing); Count II (promissory estoppel); Count III (intentional interference with contractual and advantageous relations); Count IV (declaratory judgment as to the validity of the September 1994 Agreement); Count V (intentional infliction of emotional distress); and Count VI (violations of c. 93A). The original two counts of the counterclaim were restated in part in Counts III and VI of the amended counterclaim. The dismissal of those two counts on pure state law grounds has not been appealed.

10. One of the factual misstatements in the Petition is the assertion that this letter contained all of Bishay's claims against Citizens and thus Citizens was on notice of such claims at the time of confirmation. This is wrong. What ultimately became the focus of Bishay's state court claims once his claim of wrongful acceleration was dismissed, was the assertion that Citizens wrongfully refused full repayment of the loan in November 1995. This refusal allegedly prevented Bishay from securing the release of Citizens' liens on $18 million of real estate, which, in turn, prevented him from engaging in an initial public offering, the proceeds from which were earmarked for the opening of a series of automobile superstores across the country that, over the ensuing ten-year period, would have generated profits of over $90 million. Plainly, the October 1995 letter

(Cont'd)

that letter in any manner whatsoever in the ensuing six months leading up to the confirmation hearing. As seen earlier, as of the confirmation hearing, Bishay's own lawyer disavowed any claims against Citizens other than the two discrete claims set forth in his pending counterclaim.

In May 1997, Citizens filed its second summary judgment motion seeking dismissal of Bishay's entire counterclaim. (P. App. 21a) In November 1997, the Superior Court allowed Citizens' motion in part and denied it in part. (P. App. 34a) As to the four new counterclaims alleged by Bishay, the court held that they were barred by the res judicata effect of the Plan. The Superior Court held that "any reservation of a debtor's right to pursue rights and remedies outside of the bankruptcy proceeding must specifically identify the cause of action reserved." (P. App. 24a) Here, the "language of the reservation in the reorganization plan is far too broad and vague to prevent the Confirmation Order from constituting res judicata as to all claims other than the two specific claims pending in the Superior Court at the time of the Order." (P. App. 26a)

As to the two previously pending claims that alleged untoward conduct prior to September 16, 1994, the Superior Court held that those claims were barred by the general release executed by Bishay as part of the September 1994 Agreement.[11] (P. App. 27a-31a) Five subsections of Bishay's

(Cont'd)
could not have put Citizens on notice of a claim predicated on alleged conduct that was then over a month from occurring. Significantly, the Appeals Court held that Bishay never tendered payment as alleged and that Citizens never wrongfully refused to accept any such payment. (R. App. 8a and n.11)

11. Bishay sought to vitiate the general release by alleging economic duress. That defense was unsuccessful, and Bishay did not appeal that determination. Indeed, on appeal to the Appeals Court, Bishay argued for reinstatement of those claims only to the extent they alleged conduct post-September 1994. (*See* R. App. 7a)

c. 93A claim survived the first summary judgment motion. (P. App. 34a) Ultimately, after two cross-motions for reconsideration, these five subsections were dismissed on the basis of res judicata,[12] the doctrine of absolute privilege and the inability to prove damages as required under c. 93A. (R. App. 19a-26a; 35a-38a)

Bishay appealed to the Appeals Court which affirmed all of the judgments of the Superior Court.[13] The Appeals Court adopted the reasoning of the Superior Court and found "no merit in Bishay's argument that general or blanket type language in the reservation clause preserved his claims in the amended counterclaim." (R. App. 4a-5a at n. 6.) The Appeals Court further found no merit to Bishay's assertions that: (1) the classification of Citizens' claim as impaired meant approval of that claim was not final; (2) he should receive a more favorable interpretation of the reservation clause because it was drafted by Citizens; or (3) the court should consider statements made by Citizens' counsel at the confirmation hearing. (*Id.*)

The Appeals Court alternatively found that all claims based on post-September 1994 conduct were dismissable for failure of proof. (R. App. 7a-9a)

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12. This dismissal based on res judicata is different from that being appealed here. It arose from the Bankruptcy Court's decision available at *In re 1095 Comm. Ave. Corp.*, 204 B.R. 284. *See* footnote 3, *supra*.

13. The Appeals Court's decision is an unpublished summary decision pursuant to its Rule 1:28. Such decisions "are not to be relied upon or cited as authority in unrelated cases." *Lyons v. Labor Relations Comm'n*, 19 Mass. App. Ct. 562, 566 (1985), *rev'd on other grounds*, 397 Mass. 4981 (1986). This rule exists because such decisions are not vetted by the entire court and, while binding on the parties, may not disclose fully the facts of the case or the rationale of the judges' decision. *Id.* at 566 n.7.

REASONS FOR DENYING THE PETITION

There are several reasons why this Petition must be denied. First, this Court lacks jurisdiction because each of Bishay's claims was or is dismissible on separate, adequate and independent state law grounds. Second, the Appeals Court's decision was correct. Finally, there is no split that must be resolved by this Court.

A. This Court Lacks Jurisdiction Because Separate, Adequate and Independent State Law Grounds Support the Dismissal of the Counterclaims in Their Entirety.

As this Court has often said, jurisdiction is lacking where the decision below rests on separate, adequate and independent state grounds. *E.g.*, *Michigan v. Long*, 463 U.S. 1032, 1037 (1983); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). For this rule to apply, the "state court decision [must] indicate[] clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds. . . ." *Long*, 463 U.S. at 1042. This case satisfies this requirement even though alternative state law grounds were not expressly articulated as to each and every claim otherwise dismissed under federal res judicata principles. This is so because, as will be shown below, the Superior Court did rule on state law grounds (*e.g.*, enforcing a general release) as to certain of Bishay's claims and that ruling was never appealed. That unappealed ruling must necessarily preclude any and all claims arising out of the same time period. *See, e.g.*, *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

The four claims (Counts I, II, IV and V) dismissed on res judicata grounds were essentially predicated on two separate and distinct theories. The first was that Citizens had no right to call the loan to begin with in June 1994 and its act of doing so, plus its conduct immediately thereafter,

including the insistence on the terms of the September 1994 Agreement, were all wrongful. (*See* Counts I, subsections a-e, g-i; Count II; Count IV; and Count V). The second theory was based on Citizens' alleged failure to accept tender of full payment in November 1995, which led to retention of its lien on Bishay's assets and hence an unconquerable obstacle to Bishay's grandiose future business plans. This refusal was allegedly motivated by a concealed two-tiered attorney fee agreement that allowed Citizens' lawyers to collect those fees the longer the litigation existed. (*See* Count I, subsections f & k).[14]

1. Bishay Released All Pre-September 1994 Claims

As to the claims based on the wrongful calling of the loan in 1994 and its immediate aftermath, routine preclusion principles would prevent reviving such claims even if the res judicata decision was reversed because the Superior Court has already ruled that the general release contained in the September 1994 Agreement was valid and binding, and that Bishay's defense of economic duress was unfounded. (P. App. 27a-31a) The Superior Court made this ruling in connection with Count III and Count VI, subsections a-e and g-i.[15] Count VI contained all of the identical allegations as Count I. The only difference was that Count I was styled as "breach of contract" and Count VI as "violation of M.G.L. c. 93A, § 11." Bishay never appealed that portion of the Superior

14. Bishay also included certain miscellaneous claims such as alleged improper tampering with a real estate appraisal; filing of a fraudulent complaint; and wrongful attempts to obtain pre-judgment security. All of these claims were disposed of on state law grounds. *See* discussion at p.17.

15. This Court will recall that the two counts of Bishay's original counterclaim were restated in Counts III and VI of the amended counterclaim and that the dismissal of those claims on pure state law grounds (in the first instance) has not been appealed.

Court's decision, and thus, regardless of what happens here, that holding is final. *See, e.g., Federated Dept. Stores, Inc.*, 452 U.S. at 398. (*See* R. App. 7a and n. 9) Thus, subparagraphs a-e and g-i of Count I (breach of contract), which are based on conduct preceding the execution of the general release contained in the September 1994 Agreement are barred as those are the identical allegations of Count VI disposed of by the Superior Court. (*Id.*) Count II (promissory estoppel) is based entirely on pre-September 1994 conduct and is similarly barred. Count III (intentional interference with contractual and advantageous relations) is also based on pre-September 1994 conduct as it relates to allegations involving the FDIC. Count IV for declaratory relief is predicated solely on the assertion that "Citizens Bank coerced Bishay to execute under duress, a September 16, 1994 amendment to the revolving credit-line agreement containing a general release." It is, thus, barred. Those aspects of Count V (emotional distress) that are based on pre-September 1994 conduct are similarly barred.

2. The Post-September 1994 Claims

The claims that remained after the application of the general release involved the assertion that Citizens wrongfully refused to accept payment in full in November 1995 and to release its collateral (*see* amended answer and counterclaim, ¶43 and Count III); that Citizens wrongfully filed the original complaint in June 1995 and then improperly sought pre-judgment security several times (Counts I and VI, subsections 1 and m); that Citizens allegedly tampered with an appraisal in June 1995 during the collection process (Counts I and VI, subsection j); and that Citizens improperly entered into a two-tiered billing arrangement with its counsel and tried to extract from Bishay legal fees to which it was not entitled (Counts I and VI, subsections f and k). Each of these claims has been dismissed on unappealed state law grounds.

With respect to any claim based on Citizens' alleged refusal to accept full repayment of the loan in November

1995 and to thereafter discharge its liens, the Appeals Court ruled as follows:

> Even if we were to consider those claims not barred by the release and res judicata principles, they lack merit. In summary, (1) at the time in issue, there is no indication that Bishay ever tendered any payment or actually had a commitment for financing from any lender, and in indicating its intent to require a release, in the circumstances, Citizens Bank was not in breach of any obligation to Bishay; (2) no claim of interference could arise because Citizens Bank did not induce anyone to act unfavorably toward Bishay or impede his performance; and (3) the Bankruptcy Court's determination that the release of claims was proper thus precludes the c.93A claim to the extent it was based on Citizens Bank's collection efforts.

(R. App. 8a)

To the extent Bishay asserted a claim of emotional distress based on Citizens' collection efforts after September 1994, the Appeals Court also addressed this issue on purely state law grounds:

> Also, Bishay's argument (B.Br. 36-44) attempting to revive his claims for intentional infliction of emotional distress and his unsupported characterization of Citizens Bank's conduct as unethical, oppressive and unscrupulous and violative of c.93A, fail to raise genuine issues of material fact.

(R. App. 8a-9a)

With respect to any c.93A claim based on the so-called "two-tiered billing arrangement", the Appeals Court stated:

> There is nothing in this assertion warranting disturbing the judge's careful analysis, concluding Bishay has no reasonable expectation of demonstrating that his alleged damages were caused by Citizens Bank's involvement in the two-tiered fee arrangement.

(R. App. 9a)

As for Bishay's claims based on the filing of the original complaint by Citizens in June 1995 and the subsequent attempts through motion practice to secure pre-judgment attachments, the Superior Court dismissed those claims under the state law doctrine of absolute privilege. The Superior Court further rejected Bishay's attempts to escape that privilege by finding there was no factual basis to support claims of abuse of process or malicious prosecution. (R. App. 23a-26a) Bishay did not appeal this ruling to the Appeals Court.

Finally, Bishay's claim based on alleged interference with a real estate appraisal (Counts I and VI, subsection j) was dismissed by the trial court on res judicata grounds stemming from the post confirmation hearing on fees and expenses to be assessed. (R. App. 20a-21a) *See also In re 1095 Comm. Ave. Corp.*, 204 B.R. at 305. This ruling of the Superior Court was not appealed.

As can be seen, every claim and every factual predicate was expressly addressed on separate, adequate and independent state law grounds either by the Appeals Court or in unappealed portions of the Superior Court's decisions. Thus, under this Court's precedent in *Michigan v. Long* and *Caldwell v. Mississippi*, jurisdiction is lacking and the Petition must be denied.

B. The Appeals Court Was Correct

As to the Appeals Court's application of federal res judicata principles to bankruptcy plans of reorganization, Bishay argues the decision is wrong because, although supported by ample case authority, it purportedly does not find direct support in the language of 11 U.S.C. § 1123(b)(3). (Pet. at 7-8) This Petition constitutes the first time § 1123(b)(3) has been mentioned in these proceedings, and it is a red herring. The essence of Bishay's new argument is that § 1123(b)(3) creates a more lenient exception to res judicata rules than otherwise abounds under federal common law. The argument has no merit as § 1123 only identifies the things that a plan of reorganization permissibly may do; it does not say how they must be done. Thus, Congress left it for the courts to determine the "how to." Of course, the contents of a plan of reorganization are subject to common law principles like res judicata. *In re Justice Oaks II, Ltd.*, 898 F. 2d 1544, 1550 (11th Cir. 1990).

Quite naturally, res judicata principles in the bankruptcy arena are grounded first in general federal res judicata jurisprudence. The general rule is that later brought claims that were or could have been adjudicated in a prior proceeding will be precluded unless the previous action involved an express reservation of these claims. *E.g.*, *Apparel Art Int'l v. Amertex Enters. Ltd.*, 48 F.3d 576, 586 (1st Cir. 1995). Because confirmation orders are final orders for the purpose of res judicata principles, and reorganization plans are permitted to do what courts otherwise have the inherent authority to accomplish (i.e., expressly reserve claims), the question becomes what language in a plan is sufficient to constitute an express reservation. The vast majority of courts ruling on this question have held that the language of the reservation clause must specifically identify the claims to be reserved. *See*, *e.g.*, *D&K Prop. Crystal Lake v. Mutual Life Ins. Co.*, 112 F.3d 257, 261 (7th Cir. 1997) ("[a] blanket reservation that seeks to reserve all causes of action reserves nothing. To hold otherwise would

eviscerate the finality of a bankruptcy plan containing such a reservation, a result at odds with the very purpose of a confirmed bankruptcy plan."); *In re American Preferred Prescription, Inc.*, 266 B.R. 273, 277, 279 (E.D.N.Y. 2000) (a claim brought pursuant to a blanket reservation, which does not describe with specificity what actions are reserved for post-confirmation determination, will be barred by res judicata); *Micro-Time Mgmt. Sys., Inc. v. Allard & Fish, P.C.*, 983 F.2d 1067 (6th Cir.) (table), *cert. den.*, 510 U.S. 906 (1993) (general language reserving to a debtor the right to bring post-confirmation suits nonetheless allows opponents to raise res judicata defense); *In re Kelly*, 199 B.R. 698, 704 (9th Cir. BAP 1996) (general reservation of rights in confirmed plan insufficient to prevent application of res judicata); *In re Tippins*, 221 B.R. 11, 23 (Bankr. N.D. Ala. 1998) (failure of debtor to list specific claims in schedules subjected later filed actions to res judicata defense despite general reservation of claims language in plan); *In re County of Orange*, 219 B.R. 543, 558 (Bankr. C.D. Cal. 1997) (where debtor fails to mention specific cause of action in schedules, disclosure statement or plan, general reservation clause insufficient to prevent application of res judicata); *Browning v. Levy*, 283 F.3d 761, 775 (6th Cir. 2002) ("blanket reservation was of little value to the bankruptcy court and the other parties to the bankruptcy proceeding because it did not enable the value of [debtor's successor's] claims to be taken into account in the disposition of the debtor's estate."); *Westland Oil Dev. Corp. v. MCorp. Mgmt. Solutions, Inc.*, 157 B.R. 100, 103 (S.D. Tex. 1993) ("[Debtor] knew about the claim, was mad about it, and hid it within the murky language of the general retention clause."); *In re Huntsville Small Engines, Inc.*, 228 B.R. 9, 13 (Bankr. N.D. Ala. 1998) (finding preference action precluded by plan confirmation under doctrine of res judicata where plan and disclosure statement "only contained a general retention clause reserving the debtor's right to pursue post-confirmation all pre-petition causes of action without specifically disclosing the cause of action against [creditor]."). *See also In re Howe*, 913 F.2d 1138, 1147 (5th Cir. 1990) (holding that "when a confirmed

plan discloses and specifically treats the creditor's claim, and the debtor has had a full opportunity to contest the creditor's claim in an adversary proceeding that is, in effect, settled in the plan, the debtor cannot collaterally attack the bankruptcy court's decision five years later in an action based on the same transaction."). *Compare In re Hooker Invs., Inc.*, 162 B.R. 426, 432-34 (Bankr. S.D.N.Y. 1993) (debtor not precluded by res judicata where plan expressly reserved the claims listed in debtor's bankruptcy schedules, and schedules identified specific causes of action against particular parties).

Federal bankruptcy policy considerations amply support these holdings. First and foremost, the plan of reorganization, once approved, resolves the rights and obligations of the debtor and creditors that existed prior to that time. With respect to a specific creditor's claims, the choice exists to either have the claim "allowed" or to contest it. If the latter, a hearing can be held either pre- or post-confirmation to address the merits. But if the former, it means that the creditor's claim is found valid and binding on the debtor, with only the means of repayment left to plan treatment. *See In re Duke*, 153 B.R. 913, 917 (N.D. Ala. 1993) (an "allowed claim" is a claim fixed as to all objections, counterclaims or set-offs). Under Bishay's position, a creditor's claim could be found valid and binding (i.e., allowed), and yet subject to being found invalid and non-binding in later litigation based solely on a general, vague reservation clause that makes no mention whatsoever of defenses to the underlying claim. This is an especially absurd result when one considers that in the meanwhile, the plan may be consummated and the claim paid in full.

Similarly, a plan may be consensual or opposed. A plan is consensual where all creditors with a right to vote agree to the plan's provisions. In order for that process to occur, the plan must be disseminated ahead of time for review, consultation and, perhaps, negotiation. If objected to, the court will address those objections at the confirmation hearing. In order for a creditor to properly decide whether to consent or oppose a

proposed plan, it must know how the plan proposes to treat it. Thus, does the plan propose to "allow" or contest the claim of any particular creditor; will the claim be paid in accordance with the original contract between the parties (assuming one exists), or will it be paid pursuant to a different time-table or in a lesser amount, rendering the claim "impaired"; and will the plan, once confirmed, be the end of disputes, if any, between the parties based on what occurred up to the point of confirmation. In order for a creditor to understand exactly what it is that is being proposed, specificity is required.

This case punctuates that need. Pursuant to the Plan, Citizens' secured claim against Bishay was deemed "allowed," meaning that the claim was a legally valid and binding claim against which Bishay had no defenses. *See In re Duke*, 153 B.R. at 917. The Plan also contained a general reservation clause. At the time the Plan was confirmed, Bishay had filed a two-count counterclaim to the original complaint filed by Citizens. That counterclaim was limited to two causes of action arising out of Citizens' collection actions in the summer of 1994. They were so-called set off claims very limited in scope and presenting very little chance of exposure to Citizens. Bishay's bankruptcy counsel confirmed that these were the only two claims Bishay had and was seeking to preserve. (*See* footnote 7, *supra*.) In any event, these two limited causes of action were the only expressly identified claims that the reservation clause preserved and which Citizens was prepared to deal with in subsequent state court litigation. What was not identified were claims that went to the validity of the loan obligation to begin with. What was also not identified was an alleged $100 million of damages allegedly arising out of Citizens' efforts to collect a concededly owed $2.5 million debt. Under Bishay's position, the entire confirmation hearing potentially becomes an academic exercise: the claim is initially allowed, and upon consummation of the Plan, theoretically paid, subject to being declared null and void and any payment returned. The impracticalities of such an approach are obvious.

As the Southern District of Texas aptly stated:

> The institution of bankruptcy exists to give debtors a fresh start, not to allow debtors to seek revenge against creditors who were difficult in earlier business dealings. General retention clauses are not convenient hiding places for debtors. While a debtor is not forced to abandon claims before they are known, a debtor must disclose those claims that are likely. A claim with potential is a potential asset. The creditors have a right to know what the debtor's assets are even though the potential may be contingent, dependent, or conditional. While [the debtor] did not have to give an exact dollar value for the claim, it was obliged to give an estimate. Rather than make a good faith attempt at disclosure, [the debtor] chose not to estimate a value for this claim on the ground that "causes of action are difficult to value." The code requires adequate disclosure, not selective disclosure. Because [the debtor] failed to disclose its claim against [the creditor], it will be barred.

Westland Oil Dev. Corp., 157 B.R. at 103.

1. There Is No Basis For Interpreting The Plan Against Citizens

Faced with his own failure to properly preserve the claims he first filed post-confirmation, Bishay proffers here, as he did below, several arguments why the reservation clause should be rewritten. One of his arguments is that the Plan is essentially a contract that was drafted by Citizens, and thus should be interpreted against Citizens (i.e., expansively). However, Bishay's argument overlooks the essential nature

of the confirmation process and the basic obligations each party has to protect its own interests. In the first place, a confirmed plan is simply not subject to rules of contract construction. As one court put it:

> [a] creditor's approval of the plan cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings, simply because the gamesmanship imported from state contract law into the bankruptcy proceedings would be intolerable.

Union Carbide Corp. v. Newboles, 686 F.2d 593, 595 (7th Cir. 1982).

Moreover, the Plan, though originally presented by Citizens due to Bishay's intransigence in putting forth his own plan, was not simply accepted by the court or the parties. Rather, it was subject to significant input from all sides. In this context, it was up to Bishay (and his lawyers) to be sure Bishay's claims were preserved to the extent he wanted them preserved. As the court stated in *In re DiBerto*:

> The confirmation of a plan under Chapter 11 creates new contractual obligations of the reorganized debtor. In that context, parties-in-interest are obligated to make sure that they have no problem with the literal language of the new contractual obligations and provisions dealing with the disposition of the assets of the debtor.

171 B.R. 461, 477 (Bankr. D.N.H. 1994).[16]

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16. To the extent that Bishay is dissatisfied with the legal effect of the language agreed to in the Plan, that is an issue between Bishay and his bankruptcy counsel. *See In re Astroglass Boat Co., Inc.*, 32 B.R. 538, 546 (M.D. Tenn. 1983) (parties "may not be relieved

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The quintessential party-in-interest is of course the debtor himself. Bishay had the opportunity to negotiate and/or object to the Plan as modified prior to consummation. He had the opportunity to argue to the Bankruptcy Court the equities of the Plan then under consideration. Having allowed that process to run its course and, then, having failed to appeal, Bishay cannot ask that the Plan be rewritten.

2. The Alleged "Knowledge" of Bishay's Claims is Irrelevant

Bishay's assertion that Citizens knew what claims Bishay thought he had against Citizens as of the confirmation date, and thus knew the intent of the parties and the court in adopting the reservation clause, is without merit. As of the confirmation date, the only claims Bishay had in any way affirmatively asserted were in the two-count counterclaim filed in the Superior Court the preceding summer. The letter Bishay refers to was written more than six months prior to the confirmation hearing. After that date, Bishay had submitted his proposed plan and disclosure statement and never mentioned any of these claims.[17] In fact, despite the deficiencies found by the court in Bishay's proposed plan with respect to Citizens' secured claim, it treated those claims as "allowed," proposed to pay Citizens in full within one

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from the consequences of decisions deliberately made by their attorney, although subsequent events may reveal that such decisions were unwise").

17. At page 9 of his Petition, Bishay asserts that the "bank acknowledged in its Disclosure Statement that those claims included the ones in the comprehensive itemized list that Bishay had given Citizens in October 1995." This is insupportable on the record. The disclosure statement that Citizens would have filed with its proposed plan was never submitted by either party in any pleading in the lower courts and is thus not part of the record below. (*See* Sup. Ct. R. 12.7).

year of plan approval and made no mention of any claims whatsoever. In addition, as set forth in footnote 7 above, Bishay's bankruptcy attorney represented to the court in opposing the request for a continuing lien on Bishay's assets to defray future litigation costs, that the only claims Bishay had against Citizens were those set forth in the two-count counterclaim then on file. Thus, the October letter appeared as nothing more than an attempt to extract a settlement, which was, in fact, the caption at the top of the letter. Thus, the assertion that Citizens had "knowledge" of Bishay's claims is insupportable. Moreover, importing an intent element into reservation clauses is an invitation to endless litigation. By definition, a general reservation clause is going to be ambiguous precisely because it is so vague. Thus, courts will forever be required to hold evidentiary hearings to elicit the parties' views as to what they "intended" the clause to cover. Under analogous circumstances, the Second Circuit Court of Appeals has held that open-court statements by lawyers or judges as to their belief in the scope of a reservation clause were irrelevant to determining the legal ramifications of such clauses. *See Sure Snap Corp. v. State Street Bank & Trust Co.*, 948 F. 2d 869, 873 (2d Cir. 1991).

C. There is No Split Worthy of This Court's Attention

In a final attempt to entice this Court to grant certiorari, Bishay claims that there are three well-developed schools of thought as to the interpretation of 11 U.S.C. § 1123 such that this Court's guidance is required. Putting aside the question of whether this statute truly affects this litigation, there is no split worthy of this Court's attention. What there really is, however, is a majority rule (*e.g.*, *D&K Properties*) that has been refined by a few cases (*e.g.*, *Hooker*). That majority rule is, of course, that a general reservation clause that seeks generally to reserve all claims, in fact reserves nothing. The gloss put on by cases like *Hooker* is that if the

debtor identifies his claims in his schedules, and references the schedules in the reservation clause, then the reservation clause preserves those claims.[18] The two cases from the Bankruptcy Court in the District of Delaware that Bishay relies on as support for a third line of cases that "per se" uphold general reservation clauses do nothing of the sort. In those cases, a creditor argued that the confirmed plan precluded a post-confirmation preference action against it. In holding that res judicata was not a bar because the preference action was not based on the same cause of action as the confirmation proceedings, the court stated:

> Whereas the prior "action" addressed the treatment of [the creditor's] claims under the terms of the Plan, the instant adversary proceeding seeks avoidance of the Alleged Transfer pursuant to §§ 547 and 550. Although both actions may share some facts in common in that they both arose out of [the creditor's] pre-petition business relationship with [the debtor], both the "factual underpinnings" and "theory of" an avoidance action are completely different than a determination on the allowability and proper treatment of a creditor's claim under a plan of reorganization. As such, the instant proceeding involves an entirely different cause of action than the claims treatment in the prior confirmation hearing and therefore, res judicata does not apply.

Peltz v. Worldnet Corp., 280 B.R. 573, 587 (Bankr. D. Del. 2002). *See Cohen v. TIC Fin. Sys.*, 279 B.R. 145, 155 (Bankr. D. Del. 2002) (same).

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18. Of course, Bishay did neither.

Indeed, the holdings of these cases are rooted in general res judicata jurisprudence, and not in the particularities of the language of a reservation clause. *Peltz*, 280 B.R. at 587; *Cohen*, 279 B.R. at 155. The so-called "per-se" rule is not only merely dicta, but the court limited its rationale to preference actions. *Peltz*, 280 B.R. at 594; *Cohen*, 279 B.R. at 161. This Court need not resolve anything. This Petition should be denied.

CONCLUSION

For the reasons set forth above, the Respondent requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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May 9, 2003

APPENDIX A — MEMORANDUM AND ORDER OF THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED OCTOBER 22, 2002

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

00-P-798

CITIZENS BANK OF MASSACHUSETTS

vs.

BAHIG BISHAY[1] & others.[2]

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

This appeal by the defendants (collectively Bishay), is from the entry of a judgment ordered in 1999 by a Superior Court judge in favor of Citizens Bank for $360,427.99 for attorney's fees and costs which were allowed as reasonable collection costs relating to a loan made to Bishay in 1988 (A.4225,4229). Bishay also appeals from three prior summary judgement orders of the same judge which dismissed his

1. Individually and as trustee of Old Post Road Realty Trust and Commonwealth Realty Trust.

2. Bishay Motors & Leasing, Inc., formerly known as Bishay Motors, Inc.; Massachusetts Auto. Group, doing business as Bishay Isuzu; U.S. Auto Exchange Group Ltd.; and 1095 Commonwealth Ave. Group (A.2).

counterclaims against Citizens Bank related to its collection of the loan (A.4230). The loan was repaid through a proceeding in the United States Bankruptcy Court, concluded pursuant to a confirmatory order issued in 1996 (A.288,4230).

In this appeal, Bishay principally presents the issue whether, and to what extent, his rights were preserved in the bankruptcy proceeding to pursue his counterclaims against Citizens Bank in the Massachusetts courts (B.Br.3-4). He argues that the Superior Court judge's rulings, principally based on res judicata grounds, did not reach the full extent of those claims and thereby deprived him of his day in court. We conclude the judge's decisions were correct and affirm.

Citizens Bank commenced this action in June, 1995, by filing a verified complaint in the Superior Court (A.19). Bishay's answer contained a counterclaim in two counts, the first alleging a breach of good faith and fair dealing, and the second an alleging unfair trade practices under G.L. c. 93A (A.70,74). Bishay then filed two voluntary petitions in bankruptcy, the first in July, 1995, for 1095 Commonwealth Ave. Corp., and the second, individually, in September, 1995, which subsequently were consolidated for administration (A.218). The plan, confirmed by order of the Bankruptcy Court in April, 1996, permitted Bishay to pursue his counterclaim.[3] After Citizens Bank moved in the Superior Court to dismiss the counterclaim in June, 1996, Bishay moved to

3. The plan allowed Citizens Bank's claim for payment of the loan balance and also allowed retention of a lien on Bishay's assets to permit recovery of attorney's fees and costs in defending against Bishay's counterclaim (A.279-280).

amend it, and the amendment was allowed by a motion judge in November, 1996 (A.690), resulting in a counterclaim of six counts (A.692-726). Four decisions by a different Superior Court judge followed, resulting in the dismissal of Bishay's entire amended counterclaim and the award of collection costs to Citizens Bank.

1. *Application of res judicata.* In the first of the Superior Court orders challenged by Bishay in this appeal, the judge considered the parties' cross motions for summary judgment on Bishay's several counts in the amended counterclaim (A.2205,2216). The judge correctly stated the controlling principle as follows: "The application of res judicata to a bankruptcy court order confirming a Chapter 11 reorganization plan generally bars later proceedings on all claims and issues concerning the debtor-creditor relationship that were actually raised during the confirmation process as well as those that could have been raised. . . ." (A.2219). See *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 978 & n.8 (1st Cir. 1995) (res judicata principles applicable to confirmation orders of a bankruptcy court). "Under a generally accepted exception to the res judicata doctrine, a party's claims are not precluded by a prior action if the court in that action expressly reserves those claims for later adjudication. *Apparel Art Intern. v. Amertex Enterprises[, Ltd.]*, 48 F.3d 576, 586 (1st Cir. 1995). *D & K Properties Crystal Lake v. Mutual Life Ins. [Co.]*, 112 F.3d 257, 260 (7th Cir. 1997)." (A.2220).

The judge reviewed the relevant language in the reservation clause of the plan confirmed by the Bankruptcy

Court,[4] correctly concluding from its wording and the record in that court that the original two counts in Bishay's counterclaim had not been adjudicated in that court and had been preserved so as to survive the confirmation order. Moreover, he stated those two counts "constitute independent claims which could be characterized as a set-off to Bishay's debt." (A.2222).

In contrast, however, the judge concluded that the additional four claims in the amended counterclaim[5] were in the nature of defenses to Bishay's obligations under the note, and that he essentially sought to relitigate the validity of that note and the forbearance agreement.[6] These additional

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4. "The Debtors' estates may retain, and by its duly authorized representative(s) settle, release or prosecute, their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the 'Alleged Claims')." (A.280).

5. We adopt the judge's summary description of the counts as follows: (I) allegations of "numerous breaches of [Citizens Bank's] express and implied duties" under the note and a forbearance agreement; (II) a claim that Citizens Bank is "estopped from treating the Note as a demand obligation and collecting the full amount"; (III) first count of prior counterclaim restated; (IV) a request for a declaratory judgment that the "Note and Forebearance Agreement are extortionate," and all payments should be ordered disgorged; (V) a claim of intentional infliction of emotional distress; and (VI) second count of prior counterclaim restated. (A.2222-2224; 712-724).

6. There is no merit in Bishay's argument that general or blanket type language in the reservation clause preserved his claims in the amended counterclaim. "A blanket reservation that seeks to reserve all causes of action reserves nothing. To hold otherwise would

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Appendix A

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eviscerate the finality of a bankruptcy plan containing such a reservation, a result at odds with the very purpose of a confirmed bankruptcy plan." *D & K Properties Crystal Lake v. Mutual Life Ins. Co.*, 112 F.3d at 261.

Bishay's assertion that classification of Citizens Bank's claim as "impaired," means that approval of the claim was not final (B.Br.18), is without merit. That assertion ignores the plain language of section 6(a) of the reorganization plan which required full payment of the loan balance on or before December 27, 1996 (A.279). Further, no reasonable reading of 11 U.S.C. § 1124 (1984) supports that assertion.

There also is no merit in Bishay's assertion that he should receive a more favorable interpretation of the reservation clause because it was drafted by Citizens Bank. Compare *Union Carbide Corp. v. Newboles*, 686 F.2d 593, 595 (7th Cir. 1982) (approval of a plan by a creditor "cannot be deemed an act of assent having significance beyond the confines of the bankruptcy proceedings, simply because the gamesmanship imported from state contract law into the bankruptcy proceedings would be intolerable"). Moreover, there is no indication that Bishay did not have adequate opportunity to contest the plan or seek its modification.

Similarly, there is no merit in Bishay's request that we consider statements made by counsel for Citizens Bank at the confirmation hearing (B.Br.20-23). Compare *Sure-Snap Corp. v. State Street Bank & Trust Co.*, 948 F.2d 869, 873 (2d Cir. 1991) (even comments by a judge in a colloquy with debtors were "not dispositive of. . . allegedly reserved right," and did not affect application of res judicata principles). In the judge's third decision he stated, "Bishay now asks this Court yet again to adopt his interpretation of the reservation [clause]. This the court declines to do." (A.3392). We similarly decline any invitation by Bishay to consider any reinterpretation by reading any "intent" into the reservation clause (see B.R.Br.2-8).

claims were not expressly identified in the reservation clause, the bankruptcy schedules (A.3224-3267), or in the previously filed counterclaim in Bishay's answer to Citizens Bank's complaint.[7] Because the Bankruptcy Court ordered the payment of Citizens Bank's claim, inherent in that order is the court's determination of the validity and enforceability of the note and forbearance agreement. The judge therefore properly stated that "[f]inal orders of the bankruptcy court are res judicata as to all matters that were or could have been litigated before the bankruptcy court," see *Federal Deposit Ins. Corp. v. Shearson-American Exp., Inc.*, 996 F.2d 493, 497 (1st Cir. 1993), cert. denied, 510 U.S. 1111 (1994), and correctly concluded that the confirmation order had res

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7. The judge noted that the Bankruptcy Court allowed a joint motion on September 4, 1996, authorizing Bishay to employ special counsel to pursue the litigation then pending in the Superior Court, No. 95-1312A (A.2222 n.10).

There is no merit in Bishay's assertion that the counts in his amended counterclaim were preserved because his proposed version of that counterclaim was attached to a stipulation filed in the Bankruptcy Court with respect to a fee dispute. That filing occurred before the joint motion was allowed, and there is no indication that the amended counterclaim was brought within the scope of that motion.

In any event, the amended counterclaim was first filed in the Superior Court in August, 1996, some four months after the confirmation order dated April 23, 1996 (A.294), and after the expiration of the applicable bankruptcy appeal period. Bishay did not appeal the confirmation order.

judicata effect as to counts I, II, IV, and V of Bishay's amended counterclaim (A.2219,2224).[8]

2. *The surviving claims in the amended counterclaim.* Bishay seeks to pursue his dismissed amended count III and most of the count VI claims by raising events which occurred after the general release in a September 16, 1994, forbearance agreement he executed.[9] He argues that these counts were preserved by the reservation clause, and he asserts that the judge improperly dismissed those claims, essentially ignoring the effect of the release and res judicata (B.Br.27-48).[10]

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8. The judge subsequently denied Bishay's two motions for reconsideration of these rulings in his second and third decisions (A.2481-2482, 3391-3395).

9. In his first decision, the judge addressed Citizens Bank's contention that the general release served as a defense to count III and so much of count VI concerning events occurring prior to the release, and Bishay's claim that the release was not binding because he signed it under economic duress (A.2225). The judge's conclusion that Bishay's failure timely to object to the forbearance agreement, his subsequent conduct in accepting the benefits of Citizens Bank's forbearance, and his partial performance in making sporadic payments, constituted ratification of the agreement. The judge further concluded that because the general release was valid and binding, Bishay is precluded from asserting any claim against Citizens Bank arising from their relationship prior to September 16, 1994, and allowed summary judgment for Citizens Bank on count III and subsections a, b, c, d, e, g, h, and i of count VI (A.2229).

10. In the judge's second decision, he declined to reconsider his prior rulings on count III after Bishay filed a motion for reconsideration and submitted a joint stipulation which contained

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Appendix A

Bishay asserts that in 1995, Citizens Bank's refusal to accept full payment of the loan constituted (1) a breach of its obligations to him; (2) interfered with his business obligations; and (3) violated c. 93A (B.Br.31).[11] Even if we were to consider those claims not barred by the release and res judicata principles, they lack merit. In summary, (1) at the time in issue, there is no indication that Bishay ever tendered any payment or actually had a commitment for financing from another lender, and in indicating its intent to require a release, in the circumstances, Citizens Bank was not in breach of any obligation to Bishay; (2) no claim of interference could arise because Citizens Bank did not induce anyone to act unfavorably toward Bishay or impede his performance; and (3) the Bankruptcy Court's determination that the release of claims was proper thus precludes the c. 93A claim to the extent that it was based on Citizens Bank's collection efforts. Also, Bishay's argument (B.Br.36-44) attempting to revive his claim for intentional infliction of

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a proposed amended counterclaim. The judge rejected consideration of Bishay's claims alleging interference with contractual relations after the September 16, 1994, release, and declined to alter his ruling that only the two claims pending in the Superior Court at the time of the bankruptcy confirmation order had been preserved (A.2477-2479, 2481-2482).

11. The related factual background is that after filing the bankruptcies, in November, 1995, Bishay asked what terms Citizens Bank would require to discharge all its security for the defaulted loan if he could obtain financing to repay the loan. The response was that a release of all theoretical claims would be required (A.642-646). Bishay claims the collateral then securing the loan balance of $2.4 million was, disproportionally, worth $18 million (B.Br.30).

emotional distress and his unsupported characterization of Citizens Bank's conduct as unethical, oppressive, and unscrupulous and violative of c. 93A, fail to raise genuine issues of material fact.

With respect to Bishay's c. 93A argument (B.Br.45-48) based on Citizens Bank's two-tiered billing arrangement with its attorneys, for which it was sanctioned in the Bankruptcy Court (A.1310-1350), Bishay asserts that a causal relationship existed between that arrangement and Citizen Bank's refusal to accept payment of the loan in 1995, and contrary to the judge's conclusion, that he suffered damages. There is nothing in this assertion warranting disturbing the judge's careful analysis, concluding Bishay has no reasonable expectation of demonstrating that his alleged damages were caused by Citizens Bank's involvement in the two-tiered fee arrangement (A.3396-3398).[12]

3. *Award of attorney's fees.* In his fourth decision, and after a thorough analysis of the parties' claims, the judge determined that Citizens Bank had a right to recover $360,427.99 in attorney's fees and costs incurred as the

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12. Acting on a motion of Citizens Bank for reconsideration, the judge addressed the c. 93A issues raised in subsections f and k of count VI in his third decision (A.3396). He concluded that Bishay had not suffered any monetary loss in the course of the Bankruptcy Court's resolution of the two-tiered fee issue. He explained that "the amount of fees owed by Bishay was reduced to reflect the amount Citizens [Bank] itself would have paid its attorneys for the work. Moreover, the attorney's fees and expenses Bishay incurred in challenging the dual billing arrangement were set off against the fees he owed Citizens [Bank] under the loan agreement." (A.3397).

reasonable costs of collection of the loan from April 25, 1996, through November 30, 1998 (A.4224). Bishay claims that the note was paid "some time before a substantial part of those legal fees were incurred," and accordingly when the note was paid, the fees incurred thereafter could not constitute reasonable fees for "collection and enforcement" of the note (B.Br.49). Arguing this point for the first time in this appeal (see memorandum in opposition to summary judgment at A.3702-3721), Bishay is not entitled to consideration of that argument in this court. See *Royal Indem. Co. v. Blakely*, 372 Mass. 86, 87-88 (1977).

In any event, Bishay fails to show that the language of the note (A.32), his guarantees (A.40,44,56), or the relevant provisions of the Bankruptcy Court's approval of a lien on his assets (A.280), restricted his contractual obligations after the note was paid. He also fails to show how the fees awarded were not related to litigation arising out of the collection process, or that there was any error in the judge's thorough analysis of the course of this litigation (A.4216-4224).[13] The judge properly concluded that "Bishay vigorously pursued his purported $100 million counterclaim against [Citizens Bank] to no avail, despite his clear contractual obligation to pay . . . collection costs in the event his claim

13. The judge noted that the fees requested represented nearly two thousand hours of work, that Bishay asserted a counterclaim he valued at $100 million, involving complex issues of bankruptcy law, res judicata, contract, and c. 93A, and the filing of over one hundred pleadings. He stated that "every point on every issue was vigorously contested by both parties," and that Citizens Bank ultimately succeeded in obtaining judgment in its favor on Bishay's entire counterclaim (A.4220).

was unsuccessful." (A.4224). Although Citizens Bank's claim with respect to the unpaid loan balance was satisfied on December 27, 1996,[14] because Citizens Bank's complaint and Bishay's counterclaim then were pending in the Superior Court, it cannot be said that the parties had reached an end to all "charges of the holder . . . in connection with the collection and enforcement of [the note]." (A.32). Bishay's counterclaim was grounded in allegations of improper conduct by Citizens Bank in collecting the note, which Bishay not only pressed after the note had been paid, but had he been successful, he essentially would have overturned the validity of Citizens Bank's collection of the note. Citizens Bank incurred additional fees and costs in withstanding Bishay's continuing attack on the validity of its collection of the note, and those fees and costs properly were an integral part of the collection process. Compare *Penney v. First Natl. Bank of Boston*, 385 Mass. 715, 723 (1982) (attorney's fees and costs incurred by bank in defending against debtor's action brought after sale of debtor's collateral "were an integral part of the collection process").[15] See *Leventhal v. Krinsky*, 325 Mass. 336, 342 (1950); *Covich v. Chambers*, 8 Mass. App. Ct. 740, 752 (1979).

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14. The Bankruptcy Court order regarding discharge of debtors states in relevant part: "In accordance with the terms of the Confirmed Plan, all claims of creditors were satisfied in full on December 27, 1996 with the exception of certain legal fees and costs of Citizens Bank. . . ." (A.3070-3071).

15. Bishay no longer challenges the judge's conclusion that Citizens Bank was entitled to $117,765.24 in fees as a prevailing party in connection with its first motion for summary judgment, an amount which was included in the total award (A.4223-4224).

Appendix A

4. *Costs incurred after judgment and in this appeal.* Citizens Bank requests attorney's fees and costs it claims were allowed in the Superior Court, and to March 17, 1999, when the award was entered (C.B.Br.45-46). Because this request concerns matters beyond our purview in another court, we decline to consider the request. Citizens Bank may, however, request its attorney's fees and costs in connection with this appeal by filing a petition with this court, together with the necessary back-up materials, within fifteen days of the issuance of the rescript in this case. Bishay shall have ten days to respond to that submission, in accordance with *Yorke Mgmt. v. Castro*, 406 Mass. 17, 20 (1989).

Judgments affirmed.

By the Court (Jacobs, Cypher,
& Kantrowitz, JJ.)

s/ Ashley Ahern
Clerk

Entered: October 22, 2002.

APPENDIX B — MEMORANDUM OF DECISION AND ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED FEBRUARY 11, 1998 AND FILED FEBRUARY 17, 1998

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 95-1312A

CITIZENS BANK OF MASSACHUSETTS,

Plaintiff,

vs.

BAHIG BISHAY[1] & others[2],

Defendants.

MEMORANDUM OF DECISION AND ORDER ON PARTIES' CROSS-MOTIONS FOR RECONSIDERATION

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1. Individually and as Trustee of Old Post Realty Trust.

2. Commonwealth Realty Trust, Bishay Motors & Leasing, Inc. f/k/a Bishay Motors, Inc., Massachusetts Auto Group, Ltd., and 1095 Commonwealth Ave. Corp.

Appendix B

INTRODUCTION

The plaintiff, Citizens Bank of Massachusetts (Citizens), brought this action in an attempt to recover more than $1.5 million owed by defendant Bahig Bishay and various trusts and corporations controlled by him under a defaulted promissory note. This debt has since been repaid as a result of a Chapter 11 plan confirmed by the Bankruptcy Court on April 23, 1996. However, numerous counterclaims by Bishay against Citizens remain pending in this action. In a Memorandum of Decision and Order dated November 24, 1997 and filed December 1, 1997, this Court granted Citizens' motion for summary judgment on the vast majority of Bishay's amended counterclaim and denied Bishay's cross-motion for partial summary judgment. This matter is now before the court on the parties' cross-motions for reconsideration pursuant to Super. Ct. R. 9D. For the reasons discussed below, Citizens' motion for reconsideration is *ALLOWED*. Further, the defendants' cross-motion for reconsideration is *DENIED*.

DISCUSSION

I. BISHAY'S MOTION FOR RECONSIDERATION

In its November 24, 1997 Memorandum of Decision and Order, this Court granted Citizens summary judgment on Counts I, II, IV and V of Bishay's amended counterclaim on the ground that the Bankruptcy Court's April 23, 1996 Confirmation Order in the Chapter 11 bankruptcy proceedings constituted res judicata as to those claims. This Court further granted Citizens summary judgment on Count III and

subparts a, b, c, d, e, g, h and i of Count VI of the amended counterclaim on the ground that a valid and binding general release in the parties' September 16, 1994 Forbearance Agreement precluded Bishay from asserting any claims against Citizens arising from the parties' relationship prior to that date.

Bishay now asks this Court to reconsider those rulings, urging this Court to reinstate Count III of the amended counterclaim and to further hold that the broad reservation in the Chapter 11 Reorganization Plan (the Plan) permits the post-bankruptcy litigation of all other counts of the amended counterclaim not affected by the September 16, 1994 release. Bishay first argues that this Court erred in awarding summary judgment on Count III of the amended counterclaim based on the general release in the parties' Forbearance Agreement because the majority of Count III contains allegations of misconduct alleged to have occurred after September 16, 1994.

Bishay overlooks the fact that in determining that Count III was reserved for post-confirmation litigation by the Bankruptcy Court, this Court also determined that any such claim was limited to the allegations as they stood before the Bankruptcy Court when the Plan was confirmed. At that time, Bishay's counterclaim against Citizens in the present Superior Court action alleged in Count I that Citizens breached its duty of good faith and fair dealing by interfering in the FDIC matter and by refusing to subordinate its mortgage on the 1095 Commonwealth Ave. property. Liability for this conduct is barred by the general release in the September 16, 1994 Forbearance Agreement. Bishay has now submitted a

document which he contends was filed by the parties with the Bankruptcy Court on August 26, 1996: a Joint Stipulation of the Parties Relating to Requested Protective Order that Discovery Not Be Had, to which is appended several exhibits, including Bishay's proposed amended counterclaim in this Superior Court action. However, this Court notes that the Chapter 11 plan was confirmed by the Bankruptcy Court some four months earlier, on April 23, 1996; indeed, the joint stipulation relied proffered by Bishay concerns the post-confirmation attorneys fees proceedings.

Thus, to the extent that amended Count III alleges interference with contractual relations that Bishay had with parties other than the FDIC, after September 16, 1994, such claims were not part of Bishay's original complaint, were not before the Bankruptcy Court at the time of confirmation, and were not saved for post-bankruptcy litigation by the reservation in the Confirmation Plan. Accordingly, Citizens is entitled to judgment as a matter of law on Count III of the amended complaint, which this Court declines to reinstate.

Bishay next contends that this Court erred in ruling that the blanket reservation contained in the Plan was insufficient to preserve the remaining four counts of the amended counterclaim for post-confirmation adjudication. This Court concluded that because the reservation failed to expressly identify particular claims or types of actions intended to be preserved, its language[3] was too broad and vague to prevent

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3. The reservation referred to preserve "the debtors' alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters (the "Alleged Claims")".

the Confirmation Order from constituting res judicata as to all claims other than the two specific claims pending in Superior Court at the time of confirmation. Bishay contends that this Court improperly relied on Illinois and New York cases in concluding that a reservation of a debtor's right to pursue rights and remedies outside of the bankruptcy proceeding must specifically identify or refer to the cause of action intended to be reserved. Citing *Apparel Art International, Inc. v. Amertex Enterprises*, 48 F.3d 576 (1st Cir. 1995), Bishay argues that Massachusetts law interprets the "express" nature of a reservation more broadly than other jurisdictions and does not require identification of the particular claims reserved for later adjudication.

In *Apparel Art International Inc.*, the plaintiff subcontractor, who had been awarded $387,994 against the defendant contractor during arbitration before the AAA, filed an action in U.S. District Court (Suit #1) to enforce the arbitration award pursuant to the Federal Arbitration Act. 48 F.3d at 579. After confirming the award and entering judgment in plaintiff's favor, the court permitted the plaintiff to conduct post-judgment discovery in supplemental proceedings so that it could execute its judgment. During said discovery, the plaintiff learned of numerous asset transfers by the defendant to a company which the plaintiff believed had been created to defraud the defendant's creditors. *Id.* While these proceedings were ongoing, the plaintiff filed a separate suit in U.S. District Court (Suit #2) alleging RICO, fraudulent conveyance and alter ego claims against the defendant. *Id.* at 580. The District Court dismissed the fraudulent conveyance and related claims, stating:

> Essentially, the fraudulent transfer claim is merely one aspect of plaintiff's attempt at collection of the judgment issued in (Suit #1]. Since plaintiff has already begun that process in (Suit #1], we cannot entertain these claims again here without a real risk of allowing multiple judgments to issue for the same harm . . . The dismissal is without prejudice to any legitimate execution of judgment motions which the plaintiff may seek to file [in the supplementary proceedings in Case #1]. *Id.* at 586.

In concluding that the plaintiff could assert claims for fraudulent conveyance, depletion of corporate assets, and alter ego in the supplementary proceedings, the First Circuit held that Suit #2 did not bar such claims under the doctrine of res judicata because the District Court in Suit #2 had expressly reserved the plaintiff's right to litigate those claims in a later action. *Id.*

Bishay's argument that *Apparel Art International, Inc.* demonstrates that the First Circuit requires a less specific reservation than other jurisdictions in order to exempt a claim from the application of res judicata is simply without merit. The District Court's reservation of "any legitimate execution of judgment motions which the plaintiff may seek to file [in the supplementary proceedings in Case #1]" specifically identified the claims which were reserved: those relating to the defendant's attempt to avoid the arbitration judgment. The First Circuit did not interpret the reservation broadly, as Bishay seeks to do here, to preserve any claim the plaintiff might have against the defendant arising out of their

contractual relationship. Rather, the claims the plaintiff was allowed to bring in the supplemental proceeding were the very ones pending before the District Court when it made the reservation. Thus, the holding in *Apparel Art International, Inc.* is consistent with those cases in other jurisdictions rejecting blanket reservations in bankruptcy confirmation plans and requiring that the claims to be reserved for later adjudication be expressly identified. Accordingly, this Court declines to alter its ruling that the language in the Plan permitting Bishay and 1095 Commonwealth Ave. Corp. to assert "their alleged claims against Citizens arising from the transactions between the Debtors and Citizens and related matters" reserved only the two claims pending in Superior Court at the time of the reservation, and failed to specifically reserve the additional claims later asserted in Bishay's amended complaint. Bishay's motion for reconsideration is therefore *DENIED*.

II. CITIZENS' MOTION FOR RECONSIDERATION

Citizens urges this Court to reconsider its denial of summary judgment on subparts f, j, k, l and m of Count VI, asserting that although such claims were not encompassed in the parties' general release, they are nonetheless barred by principles of either res judicata or absolute privilege. Subpart j of Bishay's amended counterclaim alleges that Citizens violated Chapter 93A by causing a false independent appraisal of the 1095 Commonwealth Avenue property. Subpart f alleges that Citizens violated Chapter 93A by attempting to collect reimbursement for legal fees under the dual billing agreement with its counsel, Brown, Rudnick, Freed & Gesmer. Subpart k further alleges that Citizens

violated Chapter 93A by entering into the dual billing agreement, and by submitting false time entries and a false fee petition to the Bankruptcy Court. Citizens contends that these three claims are barred by the res judicata effect of the Bankruptcy Court's January 21, 1997 decision awarding attorney's fees pursuant to 11 U.S.C. § 506(b).

In that decision, the Bankruptcy Court addressed the impropriety of the appraisal at issue as follows:

> Debtors cite "impropriety in the preparation and use of the appraisals, as demonstrated by the testimony elicited at the evidentiary hearing held on April 18, 1996." The Court has reviewed the testimony from that hearing. The testimony on appraisal issues was lengthy and touched on a number of distinct appraisal-related issues; and it pertained to only one of the ten appraisals for which compensation is now being sought. The Debtors do not identify or cite the specific testimony on which they rely. They offer no argument as to why the alleged improprieties warrant denial of the appraisal fees. Nor do they even identify the improprieties they have in mind. In short, the Debtors have not articulated this objection in sufficient detail to permit either Citizens or the Court to understand, respond to, and adjudicate the substance of their objection. The compensation sought for these appraisals is reasonable and will be allowed in the amount requested.

Appendix B

Given the extensive hearing held by the Bankruptcy Court on the issue of the allegedly improper appraisal, that court's determination that Bishay had failed to clearly articulate a basis on which the court could find said appraisal to be wrongful, and the court's award of the appraisal fee to Citizens, this Court concludes that Bishay is barred from now relitigating the propriety of the appraisal fee in the form of an action under Chapter 93A. Accordingly, Citizens is correct that the doctrine of res judicata entitles it to judgment as a matter of law on subpart j on Count VI.

With respect to subparts f and k, the Bankruptcy Court noted in its decision that in opposing Citizens' application for fees, "the Debtors argue that the dual billing system violates all notions of good faith and fair dealing and constitutes an unfair and deceptive practice in violation of Massachusetts G. L. c. 93A." The Court ultimately concluded that the dual billing agreement, properly construed, was not illegal or void as against public policy; that with the exception of one of its attorneys, Citizens did not intentionally misrepresent or conceal the dual fee agreement; and that the appropriate sanction for Citizens' misconduct was to award Bishay his attorneys' fees in pursuing the issue. The Bankruptcy Court did not, however, address whether Citizens' conduct with respect to the fee agreement constituted a violation of Chapter 93A so as to affirmatively entitle Bishay to damages under that statute. Rather, the court merely rejected the argument that Citizens' conduct was so egregious as to warrant a total denial of attorneys' fees under the promissory notes. Moreover, this Court cannot conclude that the Chapter 93A issue was logically or practically necessary to the Bankruptcy Court's fee decision, as the court could have decided that

regardless of whether Citizens' conduct constituted a Chapter 93A violation under state law, a balancing of the equities required that citizens be allowed to recover some of its fees. Thus, this Court declines to hold that the issue of Citizens' Chapter 93A liability was implicitly determined by the Bankruptcy Court's January 21, 1997 Order so as to bar litigation of said claim in the present action based on res judicata.[4]

Nonetheless, Citizens' contends that its conduct with respect to the dual billing agreement was privileged. Massachusetts has long recognized that statements or other communications made by parties, counsel or witnesses in the institution or conduct of litigation are absolutely privileged, even when made maliciously or in bad faith, provided such statements relate to the judicial proceeding. *Theran v. Rokoff*, 413 Mass. 590, 591 (1992); *Sullivan v. Birmingham*, 11 Mass. App. Ct. 359, 361 (1981); *Doe v. Nutter, McClennan & Fish*, 41 Mass. App. Ct. 137, 140, rev. den., 423 Mass. 1111 (1996). Moreover, the privilege attached to such statements provides a complete defense not only to a defamation suit but to all theories of civil liability based thereon. *Sullivan v. Birmingham*, *supra* at 368; *Doe v. Nutter, McClennan & Fish*, *supra* at 140. Subpart f of Bishay's amended counterclaim alleges that Citizens violated Chapter 93A by attempting to collect reimbursement for legal fees under the dual billing agreement with its

4. It should be noted that because Bishay's claim with respect to the dual fee agreement is based on post-confirmation conduct and did not exist at the time of the confirmation proceedings, the scope of the reservation in the confirmation plan is not at issue here.

counsel, Brown, Rudnick, Freed & Gesmer. Subpart k further alleges that Citizens violated Chapter 93A by entering into the dual billing agreement, submitting false time entries to the Bankruptcy Court and submitting a false fee petition to the Bankruptcy Court. Insofar as Subpart k is based on the written and oral statements made by Citizens in the Bankruptcy Court fee proceeding, such statements cannot form the basis of civil liability. However, the bulk of Subparts f and k are based on Citizens' conduct in entering into a dual billing agreement with its attorney and then attempting to collect from debtors such as Bishay a higher billing rate than the bank itself would have to pay for the same work. These claims do not involve statements or communications made in the course of litigation and are thus not privileged. Massachusetts does not recognize the broad immunity for all actions taken by participants in the litigation process urged by Citizens.

The question then becomes whether Citizens' conduct with respect to the dual billing agreement can form the substantive basis of a Chapter 93A claim. While it is clear that abuse of process may violate Chapter 93A, Bishay cannot demonstrate such a claim in the present case. *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 777-779 (1986). Abuse of process presupposes the use of legal action for an ulterior purpose: to achieve some end other than the apparent end of the litigation process which has been initiated. *Id.* at 775-776: *Silvia v. Building Inspector of West Bridgewater*, 35 Mass. App. Ct. 451, 453, rev. den., 416 Mass. 1104 (1993). Irrespective of the propriety or impropriety of the dual billing agreement, Citizens ad no purpose in petitioning the Bankruptcy Court for fees other

than the asserted desire to collect attorney's fees under that agreement. Nonetheless, even where the institution of litigation does not constitute an abuse of process it may, in certain circumstances, constitute an unfair or deceptive practice for purposes of Chapter 93A. See *Schubach v. Household Finance Corp.*, 375 Mass. 133, 137 (1978) (holding that a company's conduct in filing collection suits in distant venues to increase the chances of obtaining default judgments could be unfair for purposes of Chapter 93A although it was permitted by the venue provisions of G.L. c. 233, § 2 and was not an abuse of process). Bishay has a colorable claim that the mere entering into of the dual billing agreement and attempt to enforce it against creditors could be deemed an unfair and deceptive act. See *Guenard v. Burke*, 387 Mass. 802, 809 (1982) (holding that an attorney's use of a contingent fee agreement in a divorce case was an unfair and deceptive practice where although the agreement was ultimately not enforced against the plaintiff, the attorney relied on the agreement to retain one third of plaintiff's recovery).

Finally, although the court in awarding actual damages under Chapter 93A must take into account that Bishay has already been compensated for those attorney's fees incurred in resisting the dual billing agreement in the Bankruptcy Court, if the court finds a knowing and wilful violation of Chapter 93A, it is arguable, but this Court does not now rule, that fees from that proceeding could be the basis of multiple damages. See *Datacomm Interface, Inc. v. Computerworld, Inc.*, *supra* at 780 (1986) (holding that where attorney's fees constitute a party's actual damages, as in an abuse of process claim, they may be multiplied under c. 93A). See also *Cohen*

v. Liberty Mutual Insurance Co., 41 Mass. App. Ct. 748, 753 (1996) (discussing the 1989 amendment to c. 93A, § 9(3) which provides that the amount of actual damages to be multiplied is the amount of the judgment on all claims arising out of the same and underlying transaction or occurrence, regardless of the existence of insurance coverage available in payment of the claim). Moreover, in the absence of other actual damages, Bishay would be entitled to recover statutory damages of twenty-five dollars. See *Brow v. Stanton*, 12 Mass. App. Ct. 992, 993 (1981); *Knott v. Laythe*, 42 Mass. App. Ct. 908, 910 (1997). Accordingly, this Court concludes that Citizens is not entitled to summary judgment on subparts f and k of Count VI of Bishay's amended counterclaim.

Finally, Subpart 1 of Count VI alleges that Citizens violated Chapter 93A by repeatedly petitioning the Court for authority to sell Bishay's antique car collection, while Subpart m alleges that Citizens violated Chapter 93A by filing the present law suit, by alleging under oath that Bishay owed $2,568,000, and by failing to disclose that part of the debt had been repaid. Citizens' conduct in alleging in its complaint that Bishay owed a particular amount under the promissory notes involves statements made in the institution of litigation which are absolutely privileged and cannot form the basis for liability under Chapter 93A. However, to the extent that Subpart m alleges that the filing of the complaint itself and petitioning of the Court to liquidate Bishay's collateral violate c. 93A, the litigation privilege would not bar an action on theories of malicious prosecution or abuse of process. See *Sullivan v. Birmingham*, *supra* at 367 n.8. Nonetheless, based on the summary judgment record, Bishay has no reasonable expectation of demonstrating at trial a Chapter

93A violation under these theories. As noted above, abuse of process presupposes the use of legal action for an ulterior or improper purpose. *Silvia v. Building Inspector of West Bridgewater*, *supra* at 453. Similarly, malicious prosecution involves perverse use of the litigation process in the sense that the defendant lacked probable cause to institute the criminal or civil action at issue. *Id.* at 453-454. Given the size of the debt owed by Bishay, his pattern of default on the parties' various forbearance agreements, and his general lack of cooperation in resolving the debt, Citizens' filing of the present action was justified and for the proper purpose of collecting the money owed. Accordingly, this Court concludes that Bishay has no viable ground for the Chapter 93A claims alleged in Subparts l and m of Count VI, entitling Citizens to judgment as a matter of law.

Appendix B

ORDER

For the foregoing reasons, it is hereby *ORDERED* that Citizens' motion for reconsideration be *ALLOWED*. Upon reconsideration, it is *ORDERED* that Citizens' motion for summary judgment be *ALLOWED* as to Subsections j, l and m of Count VI of the amended counterclaim, but *DENIED* as to Subsections f and k of that Count. It is further *ORDERED* that the defendants' motion for reconsideration be *DENIED*.

s/ Gordon L. Doerfer
Gordon L. Doerfer
Justice of the Superior Curt

DATED: February 11, 1998

APPENDIX C — MEMORANDUM OF DECISION AND ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED OCTOBER 16, 1998 AND FILED OCTOBER 21, 1998

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 95-1312A

CITIZENS BANK OF MASSACHUSETTS,

Plaintiff,

vs.

BAHIG BISHAY[1] & others[2],

Defendants.

MEMORANDUM OF DECISION AND ORDER ON PARTIES' RENEWED CROSS-MOTIONS FOR RECONSIDERATION

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1. Individually and as Trustee of Old Post Realty Trust.

2. Commonwealth Realty Trust, Bishay Motors & Leasing, Inc. f/k/a Bishay Motors, Inc., Massachusetts Auto Group, Ltd., and 1095 Commonwealth Ave. Corp.

Appendix C

INTRODUCTION

This action originated with a complaint by plaintiff, Citizens Bank of Massachusetts (Citizens), seeking to recover more than $1.5 million owed by defendant Bahig Bishay and various trusts and corporations controlled by him under a defaulted promissory note. That debt was repaid as a result of a Chapter 11 plan confirmed by the Bankruptcy Court on April 23, 1996. However, numerous counterclaims by Bishay against Citizens remained pending in this case. In a Memorandum of Decision and Order dated November 24, 1997, this Court granted Citizens' summary judgment on Counts I, II, IV and V of Bishay's amended counterclaim on the ground that the Confirmation Order entered in the Chapter 11 bankruptcy proceedings constituted res judicata as to those claims. The Court further granted Citizens summary judgment on Count III and subsections a, b, c, d, e, g, h and i of Count VI of the amended counterclaim on the ground that a valid and binding general release in the parties' September 16, 1994 Forbearance Agreement precluded Bishay from asserting any claims against Citizens arising from the parties' relationship prior to that date. Finally, this Court denied Bishay's cross-motion for summary judgment.

Thereafter, both parties moved this Court for reconsideration of that summary judgment decision. In a Memorandum of Decision and Order dated February 11, 1996, this Court granted Citizens' motion for summary judgment as to Subsections j, l and m of Count VI of the amended counterclaim, on the ground that such claims were based on written and oral statements made to the Bankruptcy Court which were privileged and could not form the basis of

civil liability.[3] However, this Court denied the motion as to Subsections f and k of Count VI on the ground that Citizens' entering into the improper dual billing agreement with its attorney and then attempting to collect from debtors such as Bishay a higher billing rate than the bank itself would have to pay could constitute unfair and deceptive practices under Chapter 93A.

With respect to Bishay's cross-motion for reconsideration this Court denied Bishay's request to reinstate Count III of the amended counterclaim. In addition, this Court denied Bishay's request that the court reverse its interpretation of the reservation in the Chapter 11 Reorganization Plan and hold that the reservation permits the post-bankruptcy litigation of all other counts of the amended counterclaim not affected by the September 16, 1994 release.

This matter is again before this Court because in August of 1998, the parties filed renewed cross-motions for reconsideration pursuant to Super. Ct. R. 9D. For the reasons discussed below, Citizens' renewed motion for reconsideration is *ALLOWED*. Further, the defendants' renewed cross-motion for reconsideration is *DENIED*.

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3. This Court further found that to the extent that the filing of the complaint, the petitions to liquidate Bishay's collateral, and the attorney's fees were not privileged, they nonetheless did not support a Chapter 93A claim based on abuse of process because Bishay had presented no evidence of an improper or ulterior motive for such acts.

Appendix C

DISCUSSION

I. BISHAY'S RENEWED MOTION FOR RECONSIDERATION

Bishay asks this Court to rescind its previous order that the reservation clause in the Chapter 11 plan was insufficient to preserve his counterclaims for post-bankruptcy litigation, and to reinstate Counts I, II, III, IV, V and subsection j of Count VI of the amended counterclaim. Bishay further asks this Court to find that he can state a claim for abuse of process and accordingly, reinstate subsections j, l and m of Count VI. In connection with these matters, Bishay urges this Court to examine the contents of a sealed envelope, containing supplemental answers to interrogatories dated September 30, 1997, which was filed in connection with Bishay's original summary judgment motion but which was apparently placed directly in the impound safe without ever being reviewed by this Court. In the interests of justice, this Court has examined the contents of the envelope to determine whether any information contained therein warrants reconsideration of the November 24, 1997 and February 11, 1996 Memoranda of Decision and Order.

This Court carefully considered the proper scope of the reservation in the Chapter 11 plan not only in the initial summary judgment decision but also, in even greater detail, on Bishay's first motion for reconsideration. That issue having been decided adversely to him on two prior occasions, Bishay now asks this Court yet again to adopt his interpretation of the reservation. This the court declines to do. Where there has been no material change in circumstances,

a court is not bound to reconsider a case, issue, or question of law once decided. *Peterson v. Hopson*, 306 Mass. 597, 599 (1940); *King v. Globe Newspaper Co.*, 400 Mass. 705, 707, cert. den., 485 U.S. 940 (1987). Although the court has the power prior to final judgment to reconsider an interlocutory ruling, such power should be exercised only where there are compelling reasons to do so, and a judge should hesitate to undo his own work. *Peterson v. Hopson*, *supra* at 603; *King v. Globe Newspaper Co.*, *supra* at 707-708. There is simply no valid reason for this Court to revisit the legal question of the proper scope of the reservation and indeed, considerations of judicial economy militate against such action. Compare *Hurley v. Berkshire Design Group*, Civil No. 92-3275B (Mass. Super. Ct. April 26, 1994) (Toomey, J.); *Flores v. Metropolitan Dist. Com'n*, Civil No. 92-4265 (Mass. Super. Ct. March 9, 1995) (McDaniel, J.); (allowing motions for reconsideration based on new case law not existing at the time of the prior summary judgment motions).

In addition, Bishay contends, for the first time, that the confirmation of the Chapter 11 plan does not constitute res judicata as to his counterclaims against Citizens because said claims were "non-core" to the bankruptcy proceeding and thus could not have been adjudicated in that forum. Bishay never even intimated this argument in either the original motion for summary or the first motion for reconsideration. Following a decision of this Court, a party has no right to a rehearing, and a question of law not seasonably raised cannot be revived by the simple expedient of bringing it forward and demanding a second ruling. *Peterson v. Hopson*, *supra* at 599-600. See also *Diversified Mortgage Investors v. Viking*

General Corp., 16 Mass. App. Ct. 142, 151 (1983). This Court will not now entertain Bishay's "non-core" argument, given his failure to raise the issue in connection with either the original summary judgment or the cross-motions for reconsideration.[4] Accordingly, this Court declines to consider the merits of Bishay's claims in his renewed motion for reconsideration or to reinstate Counts I, II, III, IV, V and subsection j of count VI of the amended counterclaim.

Finally, Bishay asks this Court to reconsider its determination that he failed to demonstrate some ulterior motive for Citizens' legal efforts to collect on the defaulted loan, which would raise a genuine issue of fact with respect to an abuse of process claim. Bishay asserts that information revealed in the June 1998 deposition of Citizens Financial Group Chairman Larry Fish[5] supplies an ulterior motive, such that subsections j, 1 and m of Count VI should be reinstated. Further, according to Bishay, "important discovery concerning the profit that Citizens-could make from foreclosure on the Bishay loans was only produced by Citizens on August 27, 1998." Bishay does not explain why he was unable to muster this information in support of either the original motion for summary judgment or his motion for

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4. This Court notes that following its decision on the parties' cross-motions for reconsideration, Bishay filed with the Bankruptcy Court a "Motion to Clarify and Amend the Reservation Clause in the April 23, 1996 Confirmed Plan of Reorganization, Nunc Pro Tunc, And Declare That the Alleged Claims of the Debtor Are Non-Core." The Bankruptcy Court denied this motion, and Bishay's appeal to the Bankruptcy Appellate Panel of the First Circuit is now pending.

5. Until 1997, Fish was also a Director of Citizens Bank.

reconsideration. The docket does not reflect that Bishay ever moved pursuant to Mass. R. Civ. P. 56(f) for additional time to conduct discovery necessary to oppose Citizens' motion for summary judgment. This Court does not consider the belated presentation of Fish's testimony to be a material change in circumstances warranting a reconsideration of the claims at issue.[6] Accordingly, Bishay's renewed motion for reconsideration is *DENIED* in all respects.[7]

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6. Moreover, an examination of the merits reveals that Fish's testimony is inadequate to establish the ulterior motive required to prevail on an abuse of process claim. Fish states in his deposition that hundreds of Citizens Bank employees were on an incentified pay plan tied to the performance of the bank. Although Fish agreed that employees in the special assets group would qualify for participation in the pay plan, he stated that he lacked any knowledge as to whether particular members of the assets group actually received incentive pay. Finally, he admitted that for members of the special asset group on the incentified pay plan, the quality of the assets held by the bank, including loans collected, would affect the incentive pay received. Bishay's theory is that Citizens' actions with respect to his loan were driven by employees' ulterior motive of obtaining "secret incentive bonuses," because the more fees and expenses the Bank recovered in connection with Bishay's loan, the bigger the bonuses for employees. Insofar as all loan collection proceedings seek to recover money, the desire to increase the bank's wealth cannot constitute an ulterior motive. Further, Bishay has failed to produce any evidence that the individuals involved in handling his loan in fact received any incentive pay connected therewith.

7. Needless to say, this Court also denies Bishay's requests, contained in his opposition to Citizens' renewed motion for reconsideration, to allow him leave to amend his counterclaim to include a separate count for abuse of process, and to grant further discovery pursuant to Mass. R. Civ. P. 56(f).

Appendix C

II. CITIZENS' MOTION FOR RECONSIDERATION

Citizens now urges this Court to reconsider its denial of summary judgment on Bishay's remaining claims, subsections f and k of Count VI, on the ground that Bishay has no reasonable expectation of proving actual damages under Chapter 93A. While Citizens did not argue the absence of Chapter 93A damages in either its original summary judgment motion or motion for consideration, this is not a case of a party seeking a further hearing on an argument unseasonably raised as a mere afterthought. Rather, in sparing subsections f and k of Count VI from summary judgment, this Court, without input from either party, raised the issue of damages, noting that while any award of actual damages under Chapter 93A would have to account for the fact that Bishay had already been compensated for the attorney's fees incurred in resisting the dual billing agreement in the Bankruptcy Court, Bishay might conceivably be able to establish damages beyond those attorney's fees.

Accordingly, because this Court *sua sponte* raised the issue of Bishay's ability to prove Chapter 93A damages, it is valid for citizens in response to now seek to present evidence on this issue. Further, given that the only cause of action remaining in this case is a Chapter 93A claim based on two narrow grounds, it is in the interests of judicial economy to consider the possible resolution of the claim on summary judgment. In doing so, this Court notes that both Citizens and Bishay have extensively briefed the issue of Chapter 93A damages in connection with the present motion.

Appendix C

To prevail on a claim under Chapter 93A, section 11, a plaintiff must have suffered a "loss of money or property." G.L. c. 93A, § 11 (1989). In this context, "money" means money, not time, and "property" means the kind of property that is purchased or leased, not such intangibles as a right to sense of security or peace of mind. *Halper v. Demeter*, 34 Mass. App. Ct. 299, 304 (1993). Where the plaintiff fails to satisfy his burden of proving that he suffered some loss of money or property within the meaning of G.L. c. 93A, § 11, summary judgment is appropriate. See *Lumbermens Mutual Casualty Co. v. Offices Unlimited, Inc.*, 419 Mass. 462, 468-469 (1995) (stating that where no judgment entered against the plaintiff, who therefore never paid out any loss, plaintiff failed to establish damages from insurer's disclaimer of coverage).

In the present case, Bishay challenged the dual billing arrangement in the Bankruptcy Court prior to that court's awarding Citizens any attorneys fees. After an extensive evidentiary hearing, the amount of fees owed by Bishay was reduced to reflect the amount Citizens itself would have paid its attorneys for the work. Moreover, the attorney's fees and expenses Bishay incurred in challenging the dual billing arrangement were set off against the fees he owed Citizens under the loan agreement. Thus, Bishay never expended any money out of his pocket as a result of the existence and attempted enforcement of Citizens' dual billing arrangement. Compare *Guenard v. Burke*, 387 Mass. 802, 809-810 (1982) (concluding that where attorney unfairly withheld funds from a client under an illegal fee agreement, c. 93A damages were the difference between the withheld funds and the reasonable

fee owed the attorney); *Doucette v. Kwait*, 392 Mass. 915, 916-917 (1984) (concluding that where attorney wrongfully charged a separate fee for services that should have been included under the contingent fee already paid by the client, c. 93A damages were the amount of that fee and interest thereon).

Nonetheless, in his answers to interrogatories, Bishay claims $100,000,000 in damages from Citizens' unfair and deceptive practices, which he proceeds to itemize. In addition, he has introduced the affidavit of Howard Gordon, an expert specializing in business valuation and business damages calculations, stating that Bishay's various businesses sustained losses in excess of 90 million dollars due to Citizens' wrongful actions. Bishay seeks to recover these damages in connection with his remaining Chapter 93A claims on the theory that because Citizens wanted to collect excessive fees under the improper dual billing arrangement, it refused repayment of Bishay's loan in November of 1995 and refused to release the collateral for the loan, preventing Bishay from undertaking various business opportunities, forcing him into bankruptcy, and resulting in $10,000 in costs in the bankruptcy proceedings and lost business profits of $94,000,000.

It is well established that in the absence of a causal relationship between the alleged unfair acts and the claimed loss, there can be no recovery under G.L. c. 93A, § 11. *Massachusetts Farm Bureau Federation, Inc. v. Blue Cross of Massachusetts, Inc.*, 403 Mass. 722, 730 (1989). On the record before this Court, Bishay has no reasonable

expectation of demonstrating that the millions of dollars of damages he alleges were caused by Citizens' entry into and attempted enforcement of the dual billing arrangement at issue. Accordingly, this Court concludes that Citizens is entitled to summary judgment on Subparts f and k of Count VI of Bishay's amended counterclaim.

Appendix C

ORDER

For the foregoing reasons, it is hereby *ORDERED* that Citizen Bank's renewed motion for reconsideration be *ALLOWED*. Upon reconsideration, it is *ORDERED* that Citizen Bank's motion for summary judgment on the remainder of Count VI of the amended counterclaim be *ALLOWED*.

It is further *ORDERED* that the defendants' renewed motion for reconsideration be *DENIED*.

s/ Gordon L. Doerfer
Gordon L. Doerfer
Justice of the Superior Curt

DATED: October 16, 1998

APPENDIX D — MEMORANDUM OF DECISION AND ORDER OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS DATED MARCH 17, 1999 AND FILED MARCH 18, 1999

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 95-1312A

CITIZENS BANK OF MASSACHUSETTS,

Plaintiff,

vs.

BAHIG BISHAY[1] & others[2],

Defendants.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR AWARD OF COLLECTION COSTS AND DEFENDANTS' CROSS-MOTION FOR ENTRY OF SEPARATE JUDGMENT

---

1. Individually and as Trustee of Old Post Realty Trust.

2. Commonwealth Realty Trust, Bishay Motors & Leasing, Inc. f/k/a Bishay Motors, Inc., Massachusetts Auto Group, Ltd., and 1095 Commonwealth Ave. Corp.

Appendix D

INTRODUCTION

This action originated with a complaint by plaintiff, Citizens Bank of Massachusetts (Citizens) , seeking to recover more than $1.5 million owed by defendant Bahig Bishay and various trusts and corporations controlled by him under a defaulted promissory note. That debt was repaid as a result of a Chapter 11 plan confirmed by the Bankruptcy Court on April 23, 1996. However, numerous counterclaims by Bishay against Citizens remained pending in this case. As a result of three separate Memoranda of Decision and Order, dated November 24, 1997; February 11, 1998; and October 16, 1998 respectively, this Court granted Citizens summary judgment on all of Bishay's counterclaims.

This matter is now before the court on Citizens' motion for approval of an award of attorneys fees and costs, pursuant to the original loan documents, incurred in defending against Bishay's counterclaim. Bishay has filed a cross-motion seeking entry of separate and final judgment on his counterclaim pursuant to Mass. R. Civ. P. 54 (b) and a stay of Citizens' motion for an award of fees and costs. For the reasons discussed below, the defendants' motion for entry of separate judgment is *DENIED*. In addition, Citizens' motion for an award of costs is *ALLOWED*.

Appendix D

DISCUSSION

I. SEPARATE AND FINAL JUDGMENT ON BISHAY'S COUNTERCLAIM

This Court will first address Bishay's motion for entry of separate and final judgment on his counterclaim and a stay of all action on Citizens' motion for costs pending his appeal of the summary judgment in Citizens' favor. Massachusetts Rule of Civil Procedure 54(b) provides in relevant part:

> When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. Mass. R. Civ. P. 5a(b).

The grant of a certificate directing entry of final judgment on fewer than all the claims in an action presents a matter for the sound discretion of the trial judge. *Acme Engineering*

& Manufacturing Corp. v. Airadyne Co., Inc., 9 Mass. App. Ct. 762, 764 (1980); *United States Trust Co. of New York v. Herriott*, 10 Mass. App. Ct. 313, 321 (1980). However, judicial discretion under Rule 54 (b) should not be exercised routinely or as a courtesy or accommodation to counsel. *Acme Engineering & Manufacturing Corp. v. Airadyne Co., Inc., supra* at 765; *United States Trust Co. of New York v. Heriott, supra* at 322; *High-tech Sales, Inc. v. Olektron Corp.*, 31 Mass. App. Ct. 912, 913 (1991). Rather, in determining that there is no just reason for delay, the court should consider the possible hardship or injustice to the parties from delay of the partial appeal, the interests of sound judicial administration, and whether appellate resolution of the separated matter will simplify, shorten or expedite trial of any of the remaining claims. *Dattoli v. Hale Hospital*, 400 Mass. 175, 177 (1987); *Paris v. Snappy Car Rental Inc.*, 18 Mass. App. Ct. 968, 968-969 (1984).

Accordingly, a certificate of separate and final judgment should be entered only where, after balancing the competing factors, the trial judge can say with assurance based on the facts in the record that finality of judgment should be ordered to advance the interests of sound judicial administration and to prevent the danger of hardship or injustice posed by delay. *U.S. Trust Co. of New York v. Herriott, supra* at 322. The preferred practice is to withhold judgment until all claims have been disposed of. *Acme Engineering & Manufacturing Corp. v. Airadyne Co., Inc., supra* at 764.

In the present case, Citizens' original complaint has been mooted by its recovery in the Chapter 11 proceedings and Citizens has received summary judgment on Bishay's

counterclaim in its entirety. Accordingly, the only aspect of this case which remains is the assessment, pursuant to the loan documents, of collection costs which Citizens is entitled to recover in light of the failure of Bishay's counterclaim. This is not a case where, objectively evaluated, there is little likelihood of recovery on a remaining claim which was asserted as a mere afterthought, so as to support the entry of separate and final judgment. Compare *Acme Engineering & Manufacturing Corp. v. Airadyne Co., Inc., supra* at 765 (concluding that entry of separate judgment was proper where remaining claims were marginal, poorly supported by the evidence, and the likelihood of success was speculative). Rather, Citizen's claim for assessment of collection costs is an integral aspect of the litigation of Bishay's counterclaim. This Court therefore concludes that a delay in the entry of judgment poses no danger of hardship or injustice. Finally, the interests of sound judicial administration militate against separate and final judgment in this case, for if Bishay loses an appeal on the merits of his counterclaim, he will inevitably file a second appeal with respect to any award of collection costs. See *Tiffany v. Sturbridge Camping Clubs, Inc.*, 32 Mass. App. Ct. 173, 178 (1992) (stating that entry of separate judgment neither achieves economy nor avoids hardship where essential facts underlie all of the claims in the case, which involve the same two parties). The usual requirement that all claims be adjudicated prior to entry of judgment exists to avoid piecemeal appeals. *Shawmut Community Bank, N.A. v. Zagami*, 419 Mass. 220, 225 (1994). Thus, this Court declines in its discretion to certify the entry of separate and final judgment on Bishay's counterclaim in this case.

Appendix D

II. CITIZENS' MOTION FOR APPROVAL OF AWARD OF COLLECTION COSTS

Citizens now seeks an award of attorneys fees and costs in the amount of $360,614.63 incurred through November 30, 1998 in defending against Bishay's unsuccessful counterclaim. The original promissory note dated June 8, 1988 provided:

> The maker agrees to pay all charges of the holder hereof in connection with the collection and enforcement of this Note, including reasonable attorneys' fees.

Similarly, Bishay's guaranty of the note provided:

> Guarantor agrees to pay a reasonable attorney's fee and all other costs and expenses which may be incurred by Lender in the enforcement of Borrower's obligation or [sic] this Guaranty or both.

The September 16, 1994 Forbearance Agreement signed by Bishay also provided that he would pay the legal fees and expenses incurred by Citizens in connection with the Note.

In confirming Bishay's Chapter 11 Plan, the Bankruptcy Court (Keener, J.) concluded:

> Citizens is entitled under its loan documents, specifically Plaintiff's Exhibit 6, to retain its liens on all assets until all of its claims are fully

> satisfied. Citizens' claims include not only principal, interest, costs and attorneys' fees accrued to date but future contingent costs in connection with the debtor's state court counterclaims against Citizens Bank.

The Confirmed Plan thus provides that:

> until Citizens actually receives (in form and substance reasonably acceptable to it) a release from (and evidence of dismissal with prejudice of) all Alleged Claims, Citizens shall retain its lien on all Estate Assets not disposed of in accordance with this Plan as security for Citizens' contractual right to reimbursement from the Debtors for Citizens' costs and anticipated costs of defending the Alleged Claims.

On January 22, 1998, Citizens and Bishay agreed to replace the $500,000 lien on Bishay's assets with an irrevocable Letter of Credit issued by Ocean Bank of Miami, Florida.

A. *NECESSITY OF A HEARING*

As a threshold matter, Bishay seeks an evidentiary hearing on the matter of Citizens' collection costs. With respect to an award of fees or costs, "a losing party who seeks to challenge factual issues raised by the affidavits and vouchers of the prevailing party must have an opportunity to be heard." *Waldman v. American Honda Motor Co.*, 413 Mass. 320, 328 (1992). See also *Boynton v. Tarbell*, 272 Mass. 142, 146 (1930) (probate court award of attorney's

fees against estate); *In re Matter of a Grand Jury Subpoena*, 411 Mass. 489, 501 (1992) (court's discretionary award of expense reimbursement to recipient of subpoena duces tecum); *J.P. Construction Co., Inc. v. Stateside Builders, Inc.*, 45 Mass. App. Ct. 920, 920 (1998) (award of attorney's fees under G.L. c. 149, § 29).

Under Massachusetts law, where one party contracts to pay the other's attorney's fees, the standard for recovery is fair and reasonable compensation for the services rendered. *Margolies v. Hopkins*, 401 Mass. 88, 93 (1987); *MIF Realty, L.P. v. Fineberg*, 989 F. Supp. 400, 402 (D. Mass. 1998). The court should consider time expended, customary hourly charges, the attorney's reputation, the demand for his services, the stakes involved in the case, the results secured, and the customary charges for similar services by others. *Cummings v. National Shawmut Bank of Boston*, 284 Mass. 563, 565 (1934); *Margolies v. Hopkins*, *supra* at 93. The documents in the present case explicitly require the fees recovered by Citizens to be reasonable.

A review of the record reveals that Bishay's brief has failed to sufficiently challenge Citizens' affidavits and vouchers to raise a factual issue which would necessitate a hearing. In demanding a hearing, Bishay does not contend that the number of hours spent on the litigation or the rate charged are unreasonable, issues that might require testimony beyond the parties' written submissions. Rather, his only specific objections to the fees are that he should not have to pay the $117,765.24 incurred in connection with Citizens' first summary judgment motion, which largely failed, or fees incurred in resisting Bishay's June 12, 1997 motion to

compel, which was granted. In addition, he contends that the Stoll affidavit claims entitlement to fees Citizens was not obligated to pay by contract. These legitimate concerns can be adequately and fairly addressed based on a careful review of the extensive documentary record before this Court.

B. *FEE AWARD*

Having carefully reviewed Citizens' application, affidavits and itemizations of fees and costs, and having given serious consideration to Bishay's arguments in opposition thereto, this Court makes the following award of collection fees and costs.

1. *General Findings*

Brown, Rudnick, Freed & Gesmer, P.C. (Brown, Rudnick) has represented Citizens in the present litigation since April of 1996. Attorney James W. Stoll (Stoll), who has been the principal attorney for citizens in this case, has 14 years experience in practice and has represented numerous banks as well as the FDIC in lender liability matters. Stoll was assisted primarily by Attorney Elise Busny, who has five years experience in practice, and by paralegal Susan Oldham.

Pursuant to the fee agreement between Citizens and Brown, Rudnick, Citizens was billed for services at a blended rate of $205 per attorney per hour. This Court finds the blended rate to be fair and reasonable. Indeed, said rate is lower than Brown, Rudnick's standard rates, which are commensurate with those charged at other firms of a similar

size and reputation. For example, Stoll's regular hourly rate varied from $275 to $325 during the period relevant to this litigation. In addition, pursuant to the fee agreement, Citizens was billed for paralegal services at the standard rate of $130 per hour. This Court also finds this rate to be fair and reasonable.

Two affidavits by Stoll set forth itemized invoices billed to Citizens by Brown, Rudnick for the period from April 25, 1996 through November 30, 1998. These invoices represent $329,207.55 in fees for close to 2,000 hours of work, as well as $31,407.08 in expenses. While this amount is large, it should be emphasized that at issue in the present litigation was a counterclaim which Bishay consistently asserted was worth $100 million. Since May of 1996, in excess of one hundred pleadings have been filed in this matter, none of which has been brief. Indeed, every point on every issue was vigorously contested by both parties. Bishay's counterclaim involved complex issues of bankruptcy law and res judicata as well as more basic contract and Chapter 93A matters. Through a series of decisions by this Court, Citizens ultimately succeeded in obtaining judgment as a matter of law on Bishay's entire counterclaim.

2. *Bishay's Objections*

This Court will now address each of Bishay's objections to Citizens' receipt of collection costs. Bishay first raises the familiar refrain that Citizens' misrepresentations with respect to its dual billing agreement with Brown, Rudnick bars it from recovering any collection costs under the loan documents. This argument has already been twice rejected,

first by the Bankruptcy Court in the fall of 1996, and then by this Court in its November 27, 1997 Memorandum and Decision of Order on Bishay's cross-motion for summary judgment. Notwithstanding Bishay's persistence in pressing such a claim, this Court declines to find Citizens' entitlement to collection costs to be affected by the existence of the dual billing agreement and its conduct before the Bankruptcy Court with respect thereto. Bishay also makes a cursory argument that Citizens should be barred from recovery because it has made repeated misrepresentations to this Court throughout the course of the present litigation. Bishay's allegations in this respect are wholly unsubstantiated and serve only to highlight his unwillingness to honor his contractual obligation to reimburse Citizens for its fees and costs in defending against his unsuccessful counterclaim.

Bishay further contends that Citizens is not entitled to fees because it has failed to demonstrate that it actually paid the requested legal fees and expenses to Brown, Rudnick. This argument lacks merit, given that Stoll's affidavit specifically states that the itemized fees and costs sought have either already been paid by Citizens or are currently owed by Citizens to Brown, Rudnick.

Bishay next complains that Citizens seeks to collect fees and expenses which it was not obligated by contract to pay Brown, Rudnick. In accordance with Citizens' May 1995 outside Counsel Policies and Procedures Manual, Citizens generally does not pay for inter-office conferences; excessive review of files, memoranda and pleadings; or multiple lawyer attendance at meetings or depositions unless approved in advance. Further, Citizens does not pay for routine in-house

photocopying, telephone, telecopying and facsimile charges; secretarial overtime; or meals, unless necessitated by overnight travel. With respect to computerized research, Citizens will pay only for use charges. Brown, Rudnick was pre-approved to perform computerized research as necessary in connection with the present case.

Bishay asserts that "Approximately $100,000 was billed for review of pleadings, papers and files which Citizens expressly refuses to pay." Citizens' itemizations do indeed reveal a multitude of hours spent by Brown, Rudnick reviewing its own pleadings, memoranda and files. Nonetheless, after carefully examining the time records, this Court did not discern excessive hours spent reviewing documents.

Further, Citizens' itemized invoices reveal numerous hours spent conferencing between attorneys on the case. However, Citizens' protocol states with respect to inter-office conferencing that "only the time of the highest-paid participant will be paid for, then only when the conference advances the matter." It appears that Brown, Rudnick adhered to this policy in its invoices, because on any particular date, only one attorney, not both, billed for conferencing activity. Again, a review of the records does not reveal any obviously excessive hours spent in inter-office conferences, and in a complex case such as this one, involving more than one trial counsel, some conferencing is to be expected.

With respect to expenses, although the invoices set forth a total of $7,851.68 for "copies," it is only routine in-house photocopying for which Citizens will not pay. The only items

which do not appear to comport with Citizens' protocol are $57.64 in meals which is not accompanied by itemized overnight travel, and $129 in "misc. expenses" which is not sufficiently itemized given that the protocol states that Citizens will not pay for non-specific billing entries. Accordingly, this Court will reduce the expenses collected by Citizens by that amount.

Finally, Bishay contends that he should not have to pay approximately $117,765.24 incurred in connection with Citizens' first summary judgment motion, which largely failed, or those fees incurred by Citizens in resisting his June 12, 1997 motion to compel, which was granted. In general, a litigant must qualify as a prevailing party in order to receive an award of attorney's fees. *Bonofiglio v. Commercial Union Ins. Co.*, 412 Mass. 612, 613 (1992). However, this Court has found no authority for the proposition that a prevailing party's success should be gaged by each individual procedural step and/or motion rather than by the overall result achieved in the case. Accordingly, Citizens's fees need not be reduced by those hours spent unsuccessfully resisting Bishay's June 12, 1997 motion to compel.

Moreover, Citizens did prevail to a large extent on its first summary judgment motion, obtaining judgment in its favor on five out of six counts of the counterclaim and successfully opposing Bishay's cross-motion for partial summary judgment. More importantly, Citizens' failure to receive summary judgment on one count of Bishay's counterclaim does not render the work done in preparation for the motion unnecessary or unreasonable. This Court

concludes that the portion of the summary judgment motion on which Citizens did not succeed cannot be severed from the successful portions so as to permit a rational diminution of fees. See *Rini v. United Van Lines, Inc.*, 903 F. Supp. 234, 238 (D. Mass. 1995), rev'd on other grounds, 104 F.3d 502 (1st Cir. 1997).

As the Appeals Court has noted, "it is altogether appropriate that the person who, in doubtful circumstances, unleashes the dogs of war should bear the heavier burden of legal costs." *Strand v. Hubbard*, 31 Mass. App. Ct. 914, 915 (1991). In the present case, Bishay vigorously pursued his purported $100 million counterclaim against the bank to no avail, despite his clear contractual obligation to pay Citizens' collection costs in the event his claim was unsuccessful.

Accordingly, after careful review of Citizens' application, affidavits and itemizations of fees and costs, and having given serious consideration to Bishay's arguments in opposition thereto, this Court determines that Citizens Bank of Massachusetts has the right to recover $329,207.55 in reasonable attorneys fees and $31,220.44 in expenses/ costs incurred from April 25, 1996 through November 30, 1998 in connection with the claims of Bishay and 1095 Commonwealth Avenue Corp. against Citizens arising from transactions between Bishay, Commonwealth Avenue Corp. and Citizens.

Appendix D

ORDER

For the foregoing reasons, it is hereby *ORDERED* that the defendants' motion for entry of separate and final judgment pursuant to Mass. R. Civ. P. 5a(b) be *DENIED*. It is further ORDERED that judgment shall enter for plaintiff Citizens Bank of Massachusetts for reasonable collection costs in the amount of three hundred sixty thousand, four hundred and twenty-seven dollars and ninety-nine cents ($360,427.99) jointly and severally against defendants Bahig Bishay, individually and as Trustee of the Old Post Realty Trust; Commonwealth Realty Trust; Hishay Motors & Leasing, Inc. f/k/a Bishay Motors, Inc.; Massachusetts Auto Group, Ltd.; and 1095 Commonwealth Ave. Corp.

s/ Gordon L. Doerfer
Gordon L. Doerfer
Justice of the Superior Court

DATED: March 17, 1999

Supreme Court, U.S.
FILED
MAY 22 2003
OFFICE OF THE CLERK

No. 02-1479

IN THE

Supreme Court of the United States

BAHIG BISHAY,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS.

On Petition for a Writ of Certiorari to the Commonwealth of Massachusetts Appeals Court

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The petition for certiorari demonstrated that this case squarely presents an entrenched, recurring, and important conflict among the circuits and state supreme courts over the validity of "reservation clauses" in bankruptcy confirmation orders. The clause in this case provided, in terms widely employed in confirmation orders, that petitioner "may retain and * * * settle, release or prosecute, [the] alleged claims against [respondent] arising from the transactions between [petitioner] and [respondent] and related matters." The court of appeals, adopting the Seventh Circuit's rule, held that such a general reservation is "too broad and vague to prevent the Confirmation Order from constituting *res judicata*." Pet. App. 26a (citing *D&K Props. Crystal Lake* v. *Mut. Life Ins. Co.*, 112 F.3d 257 (CA7 1997)). Other circuits and state supreme courts would have reached the opposite result, because the reservation clause provided that the "claims of the estate would be preserved" (*Appletree Square I Ltd. P'ship* v. *O'Connor & Hannan*, 575 N.W.2d 102, 104-05 (Minn. 1998)) or because petitioner was *at least* entitled to prove that "the parties and the court were aware that these claims would be asserted later" (*Terrebonne Fuel & Lube, Inc.* v. *Placid Ref. Co.*, 666 So. 2d 624, 634-35 (La. 1996)). Respondent importantly does not dispute that the issue can arise in almost any substantial bankruptcy, for it is frequently necessary to reserve the debtor's right to pursue claims later in order to speed the confirmation process. See Pet. 12.

The brief in opposition offers no substantial reason to deny certiorari. Most of it is consumed by respondent's self-serving twist on the facts that not only has nothing to do with whether review is warranted, but that is furthermore inaccurate and unsupported by the record. Petitioner will therefore not respond, other than to note that respondent ought not attempt to cast aspersions, having been sanctioned with its counsel to the tune of $200,000 for attempting to defraud the bankruptcy court in this case. *In re 1095 Comm.*

Ave. Corp., 204 B.R. 284 (Bankr. D. Mass. 1997), *aff'd*, 236 B.R. 530 (D. Mass. 1999). In the entire opposition, respondent musters a single, inexplicable argument for why this case is supposedly not an appropriate vehicle to resolve the circuit split: as even respondent concedes, neither the trial court nor the court of appeals dismissed the claims at issue on the state law grounds respondent now asserts were "adequate and independent." Respondent's further suggestion (never clearly stated or advanced as a reason for denying review) that the reservation clause in this case does not encompass the claims that petitioner argues were preserved – because, respondent contends, the "alleged claims" reserved by the clause include only claims that petitioner had already filed in court as of the date of confirmation – was rejected by the lower courts and respondent offers no basis for overturning their determination. Certiorari accordingly should be granted.

1. The conflict among the circuits and state supreme courts over whether general reservation clauses in bankruptcy confirmation orders are effective is recognized by both the courts and commentators. See Pet. 13 (quoting *Cohen* v. *TIC Fin. Sys.*, 279 B.R. 145 (Bankr. D. Del. 2002); C. Wesley Vines & Vernon O. Teofan, *The Preservation and Prosecution of Avoidance Actions Post-Confirmation*, 12 BANKR. DEV. J. 735 (1996)). The petition demonstrated the three-way split between courts that (i) *per se* refuse to enforce such clauses (the rule adopted below) (Pet. 14); (ii) enforce those clauses to the extent the parties were aware of the claims in question (*id.* 15); and (iii) *per se* enforce such clauses without regard to the circumstances (*id.* 16). The judgment in this case would be reversed under either of the latter two rules, at the very least because petitioner has not yet had the opportunity to establish that respondent was aware of the claims in question (and the evidence is overwhelming that it was).

Respondent addresses the critical issue of the conflict demonstrated by the petition in only two paragraphs, no doubt

because there is little that can be said against it. Respondent contends that the rule applied in this case is essentially the same as applied in a decade-old bankruptcy court decision (*In re Hooker Investments, Inc.*, 162 B.R. 426 (Bankr. S.D.N.Y. 1993)), which according to respondent holds that if the debtor "identifies his claims in his schedules, and references the schedules in the reservation clause, then the reservation clause preserves those claims." BIO 26. The petition never cited *Hooker* and respondent never explains why it thinks that decision, rather than those that conflict with the ruling below, is relevant. The cases cited by the petition do not involve a circumstance in which a confirmation order is held to import a claim referenced on a bankruptcy schedule, and respondent does not contend otherwise. In *Terrebonne Fuel*, for example, the claim was deemed preserved despite that it "was not included in the bankruptcy schedules nor was it disclosed in [the debtor's] Plan of Reorganization." 666 So. 2d at 628.

Respondent's only other argument addresses two bankruptcy court decisions correctly cited by the petition as adopting the *per se* rule that general reservation clauses are valid. BIO 26. Respondent ignores the other four decisions cited by the petition as adopting the same rule, including decisions of the Ninth Circuit (*Acequia, Inc.* v. *Clinton*, 34 F.3d 800 (1994)) and Minnesota Supreme Court (*Appletree Square*, *supra*). But in any event, respondent errs (BIO 27) in characterizing the discussion of the reservation clauses in the two bankruptcy court cases as "dictum" and alternatively "limited * * * to preference actions." Recognizing the square conflict over the enforceability of general reservation clauses, and adopting the view of numerous decisions that did not involve "preference actions," the court rejected at length the argument that "a reservation must specifically disclose the proposed subsequent action against the particular defendant." *Cohen* v. *TIC Fin. Sys.*, 279 B.R. 145, 156 (Bankr. D. Del. 2002). See also *Peltz* v. *Worldnet Corp.*, 280 B.R. 573, 589-94 (Bankr. D. Del. 2002).

Respondent's lengthier argument on the merits – quoting decisions on its side of the conflict – only highlights that the question presented is substantial and heavily debated, *i.e.*, that it merits review in this Court. But in any event, petitioner has the better of the argument. A prohibition on general reservation clauses fails to accommodate either the fact that debtors frequently will not know with certainty at the time of plan confirmation what claims are available to them or the need to move to the confirmation promptly. But in any event, when (as is alleged in this case) the debtor *is* aware of the claims, it has no reason to complain and respondent's assertions of disruption to the bankruptcy process (BIO 20) are imagined. If a creditor has a meritorious objection that a reservation clause is too broad, it can object to the bankruptcy court prior to confirmation. Here, by contrast, it was respondent that drafted the clause in the first place.

2. Unable to muster any substantial answer to the conflict presented by the petition, respondent offers a single argument for why this case is supposedly an inappropriate vehicle to decide the issue: that "the decision below rests on separate, adequate and independent state grounds." BIO 13-18. But that argument is so obviously lacking in merit that it does not require any extended discussion. The trial court and the court of appeals held that the claims now at issue – those added by petitioner's post-confirmation amendment to his counterclaim against respondent – were barred on the single ground raised by the petition: *res judicata* stemming from the bankruptcy confirmation. See Pet. App. 2a-5a (court of appeals); *id.* 22a-27a (trial court). Respondent does not contend otherwise. Respondent also admits that is an issue of federal law: "Quite naturally, res judicata principles in the bankruptcy arena are grounded first in general federal res judicata jurisprudence." BIO 18.[1]

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[1] Not only is it therefore irrelevant that the lower courts did not cite 11 U.S.C. 1123(b)(3) by name (see BIO 18) but the decisions in

Respondent's vehicle argument is therefore doomed at the outset, for it concedes that the "state court decision [must] indicate[] clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent state grounds" (*Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983) (alterations in BIO)), but in this case the "alternative state law grounds were *not* expressly articulated" with respect to the claims in question (BIO 13 (emphasis added)). Respondent's argument that this Court nonetheless lacks jurisdiction is difficult to understand, but seems to be that (i) the superior court found that a binding release applied to some of petitioner's claims (albeit not the claims at issue here); and (ii) the state courts would find that factual determination *res judicata* as to the claims now at issue "if the res judicata decision [regarding the reservation clause] were reversed" by this Court. BIO 14. The simple answer is that, with respect to the claims now at issue, the state courts *did not* rule against petitioner on the basis of the release but instead, as noted, concluded that the claims were barred by the confirmation order because the reservation clause was unenforceable. Thus, the ruling below not only did not "clearly and expressly" rely on state law grounds (*Michigan* v. *Long*, *supra*), it did not rely on those grounds at all. Respondent's argument amounts to no more than the self-serving assertion that it believes it can prevail on remand on an alternative basis, which is not a ground for denying certiorari. See, *e.g.*, Cert. Reply Br. for the Petitioner, No. 01-1500 *Clay* v. *United States* 6-7, *cert. granted*, 536 U.S. 957 (2002).

3. Respondent similarly errs in suggesting that the reservation clause in this case by its terms did not encompass the claims petitioner contends were preserved. The clause provides that petitioner "may retain and * * * settle, release or prosecute, [the] alleged claims against [respondent] arising

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any event resolved the meaning of that statute, given that the cases cited by the lower courts and the parties all involve the application of Section 1123(b).

from the transactions between [petitioner] and [respondent] and related matters." Petitioner contends that the clause preserved the counterclaims against respondent in state court that were added after the bankruptcy court entered the confirmation order. Respondent, by contrast, contends that the only "alleged claims" at the time of confirmation were those already on file. But "alleged claims" is not the same thing as "filed claims." The bankruptcy court furthermore approved petitioner's retention of counsel for the filed counterclaim "or any *future action* filed against Citizens." Ct. App. Appx. 2307-2308. The state courts accordingly did not accept respondent's construction of the clause. Rather, they obviously believed that the clause applied by its terms to more than the two pre-confirmation counterclaims, for that is the reason that they refused to enforce it as "too broad and vague." Pet. App. 26a.[2]

Nor is there merit to respondent's contention that petitioner did not make clear in the bankruptcy that he intended to pursue anything other than his two initial counterclaims. It is not possible to tell whether respondent believes this assertion (i) informs the meaning of the clause, or instead (ii) indicates that petitioner would not prevail under the intermediate rule (see *supra* at 2-3) that a general reservation clause is enforceable if the parties are aware of the claims to be preserved. If the former, the answer is that (as explained in the previous paragraph) the lower courts properly rejected the argument that the clause by its terms excluded any later-filed counterclaims. If the latter, the answer is that, because the lower courts applied a *per se* rule

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[2] Respondent also notes that its impaired claim was "allowed." But it was "allowed" only "until and unless reduced by Final Order to a judgment against Citizens." Pet. App. 24a. Not even respondent contends that the "allowed" nature of its impaired claim serves to preclude counterclaims, given that it has always conceded that the two counterclaims filed prior to the confirmation order were not barred by *res judicata*.

against enforcing general reservation clauses, petitioner had never had the opportunity to make a factual showing that respondent was aware of his claims at the time of confirmation. Respondent is thus not relying on factual findings, but on the evidence it would invoke on remand should this Court adopt the intermediate standard. Once again, the prospect that respondent might prevail on remand (here, on a factual issue) is not a ground for denying certiorari with respect to the purely legal question presented.

Furthermore, the evidence is overwhelming that respondent was fully aware at the time of confirmation of the potential claims that would be filed against it. As noted, the bankruptcy court approved petitioner's retention of counsel to bring further claims. Further, prior to confirmation, respondent filed in the bankruptcy court a disclosure statement acknowledging that "Mr. Bishay believes that Citizens has acted in bad faith, improperly and overly aggressively in several respects in connection with the enforcement of its rights as a creditor, which has resulted in harm which Mr. Bishay believes may exceed $100,000,000." As respondent admits, both the description of the claims, and their amount, refer to the future, potential counterclaims that petitioner had warned respondent that he was considering filing. See BIO 21 ("What was also not identified [in the pre-confirmation counterclaims] was an alleged $100 million of damages allegedly arising out of Citizens' efforts to collect a concededly owed $2.5 million debt."). Respondent's contrary reliance on statements by petitioner's counsel at a hearing before the bankruptcy court is misleading. Those statements simply compared the scope of the existing counterclaims to other litigation; there is no support for the assertion (BIO 11) that "Bishay's own lawyer disavowed any claims against Citizens other than the two discrete claims set forth in his pending counterclaim." Just as important, respondent's counsel successfully argued to the contrary (in securing an extraordinary order from the bankruptcy court requiring petitioner to post $500,000 to cover potential litigation costs

if he lost) that petitioner's claims were substantially more extensive than those he had filed as of that date. See Ct. App. Appx. 3046 (respondent's counsel: "Mr. Bishay's claims against the bank are extremely wide-ranging, and * * * Mr. Bishay believes that the damages that he is entitled to recover exceed one hundred million dollars").

There is accordingly no merit to respondent's contention that this case does not present the important, entrenched, and frequently recurring conflict among the circuits and state supreme courts over the validity of general reservation clauses in plans of reorganization.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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